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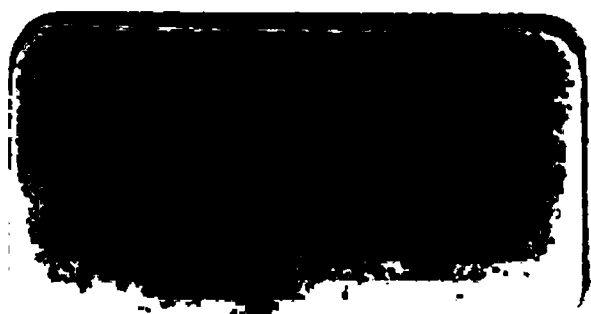
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R E P O R T S

OF

C A S E S

ARGUED AND DETERMINED IN

THE COURT OF QUEEN'S BENCH,

AND

THE COURT OF EXCHEQUER CHAMBER

ON APPEAL FROM THE COURT OF QUEEN'S BENCH.

WITH TABLES OF THE NAMES OF THE CASES REPORTED AND CITED,
AND AN INDEX OF THE CONTENTS.

BY

WILLIAM MAWDESLEY BEST, OF GRAY'S INN,

AND

GEORGE JAMES PHILIP SMITH, OF THE INNER TEMPLE,
ESQRS., BARRISTERS AT LAW.

VOL. IX.

CONTAINING HILARY TERM AND VACATION, EASTER TERM
AND VACATION, TRINITY TERM AND VACATION, AND
MICHAELMAS TERM AND VACATION, 1868.

XXXI. & XXXII. VICTORIA.

WITH SOME CASES OF SUBSEQUENT TERMS.

L O N D O N :

H. SWEET, 3, CHANCERY LANE, FLEET STREET,

Law Bookseller and Publisher.

1870.

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LONDON:
RAYNER AND HODGES, PRINTERS,
109, Fetter Lane, Fleet Street.

JUDGES
OF
THE COURT OF QUEEN'S BENCH
DURING THE PERIOD COMPRISED IN THIS VOLUME.

**The Right Hon. Sir ALEXANDER JAMES EDMUND
COCKBURN, Bart., C. J.**

Sir COLIN BLACKBURN, Knt.

Sir JOHN MELLOR, Knt.

Sir WILLIAM SHEE, Knt.

Sir ROBERT LUSH, Knt.

Sir JAMES HANNEN, Knt.

Sir GEORGE HAYES, Knt.

ATTORNEY GENERAL.

Sir JOHN BURGESS KARSLAKE, Knt.

SOLICITORS GENERAL.

Sir CHARLES JASPER SELWYN, Knt.

Sir WILLIAM BALIOL BRETT, Knt.

Sir RICHARD BAGGALLAY, Knt.

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CORRIGENDA.

- Page 10, line 2 from bottom, for "*Gander*," read "*Gandy*."
 106, pl. 2, after "allow," add "costs."
 169, line 12, for "*Chaffers*," read "*Cheffers*."
 170, note (a), add "4 *H. & C.* 629."
 215, line 3-4, for "*Rex v. The Overseers of the West Middlesex Waterworks*," read "*Reg. v. The West Middlesex Waterworks Company*."
 313, note (a), for "6 *B. & S.*" read "5 *B. & S.*"
 351, line 6, for "delecti," read "delicti."
 354, line 4 from bottom, for "than," read "with."
 372, note (a), dele "7."
 390, note (a), for "918," read "9. 18."
 410-425, wherever *Butcher v. Henderson* is referred to, the page in the note should be 403 instead of 411.
 466, note (a), dele (b).
 474, last line, for "*Roger de Hovenden, by Reilly*," read "*Roger de Hoveden, by Riley*."
 476, line 13-14, for "*Mayor of Brecon &c.*," read "*Mayor &c. of Brecon*."
 520, line 6-7, for "*Biggs v. Parkinson*," read "*Bigge v. Parkinson, in error*."
 line 13, for "*M'Paddon v. New York Central Road*," read "*McPadden v. The New York Central Railroad Company*."
 521, line 1, for "*Becket*," read "*Birkett*."
 610, line 18, for "*Birchfield*," read "*Burchfield*."
 637, line 3-4, add comma after "assigns," and after "thereof."
 647, line 7, dele "how."
 705, note (c), for "266," read "267."
 752, note (b), add, "See however note to *Spencer's Case*, 1 *Smith L. C.* 55-6, 6th ed."
 830, line 3 from bottom, dele "*Counties*."
 959, line 12, for "*Ordis*," read "*Oldis*."
 In vol. 8, p. viii., insert "*Regulæ Generales, Michaelmas Term, 1867* - - 823."

CASES

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ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

HILARY TERM,

XXXI. VICTORIA.

The Judges who usually sat in Banc in this
Term were:

COCKBURN C. J.

MELLOR J.

BLACKBURN J.

LUSH J.

BROWN, appellant, BUSSELL, respondent.

Thursday,
January 22nd.

FRANCOMB, appellant, FREEMAN, respondent.

*Nuisances
Removal Act,
1855, 18 & 19
Vict. c. 121.
ss. 8. 12. 22.
Person by
whose act, &c.
the nuisance
arises.
Nuisance by
acts of several
persons, or by
acts of tenants,
or under claim
of easement.*

By The Nuisances Removal Act for *England*, 1855, 18 & 19 *Vict.* c. 121. s. 8., the word "nuisances" includes any ditch or drain so foul as to be a nuisance or injurious to health; and any accumulation or deposit which is a nuisance or injurious to health. By sect. 12, where a nuisance is ascertained by the local authority to exist, they shall cause complaint thereof to be made before a justice of the peace; and such justice shall issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices, and if it be proved to their satisfaction that the nuisance exists, they shall make an order on such person, owner or occupier, for the

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abatement or discontinuance and prohibition of the nuisance. By sect. 22 the local authority are required to lay down a sewer along or instead of a ditch used for the conveyance of sewage when it cannot in their opinion be otherwise rendered innocuous.

1. An order may be made under sect. 12 upon a person who causes a nuisance, though it arises at a distance from his premises.

2. Where several persons drain into one place, an order under sect. 12 may be made upon one whose drainage by itself causes a nuisance.

3. But if, though the aggregate drainage is a nuisance, the drainage of each is not by itself enough to cause a nuisance; *Quære*, whether an order should be made under sect. 12, or a sewer be laid down under sect. 22? And, per *Blackburn J.*, it is for the local authority to determine which.

4. An order under sect. 12 may be made upon a person who claims an easement to drain through land of *A.* into a watercourse on land of *B.*

5. *F.*, the owner of six houses let to yearly tenants, made a drain from them by leave of the owner of adjoining land through his land into a watercourse on *W.*'s land, where the drainage became a nuisance. Held, that an order under sect. 12 was rightly made on *F.*

THESE were cases stated by justices under stat.
20 & 21 *Vict. c. 43. s. 2.*

BROWN, appellant, BUSSELL, respondent.

The appellant is a brewer, residing and carrying on business at *Esher*, in the parish of *Esher*, in the county of *Surrey*, and he was summoned, with several other inhabitants of that parish, to answer a complaint made by the respondent, the officer for and on behalf of the Committee of the *Esher* District, appointed by the guardians of the *Kingston* Union, that a certain ditch or watercourse, situate at *Sandown Place*, in the parish of *Esher*, and within the district under The Nuisances Removal Act for *England*, 1855, 18 & 19 *Vict. c. 121.*, of the complainants, was foul and offensive and a nuisance injurious to health, and that the nuisance was caused by the act or default of the appellant and others.

The premises of the appellant are in the village of *Esher*. The open ditch complained of, which was proved by the respondent to be a nuisance injurious to health, is on *Ditton Marsh*, on the right hand side of the turnpike road leading from *Esher* to *Kingston on Thames*;

and commences close to the *Sandown* turnpike gate, about half a mile from the appellant's premises, and extends thence for some distance along the right hand side of the turnpike road towards *Kingston on Thames*.

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The appellant's premises formerly drained into a sand pit or sand cave under a private garden. About twenty-two years ago the drain from those premises was first made through that garden to join a covered barrel drain or sewer which runs down the turnpike road from the village of *Esher* towards *Kingston on Thames*, and about 300 yards from the appellant's premises turns into and upon the *Sandown Place* Estate, whereon it discharged itself into an open ditch or watercourse. In 1855 the road surveyor cut off the drain from the appellant's premises, and stopped it up by a slab stone placed across it, in pursuance of an order of the Turnpike Road Trustees, which recited that they, having taken into consideration the great nuisance affecting the turnpike road running through the village of *Esher* by the overflowing of the filth and sewage arising through the drains which opened into it, were of opinion that the principal cause of the nuisance arose from the brewery, now belonging to the appellant.

The owner or occupier of the *Sandown Place* Estate for many but not twenty years before diverted, used, and disposed of the sewage and refuse water from the appellant's premises, by turning or allowing it to run over meadow lands belonging to the estate for the purpose of irrigating and fertilizing them. Such user and disposal of the sewage and refuse water was afterwards discontinued by the owner or occupier of the estate, and it was then turned by the owner or occupier into and down certain open ditches on the estate, which ulti-

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as shall be necessary for the effectual carrying on of any business or manufacture shall be punishable as a nuisance under this section, when it is proved to the satisfaction of the justices that the accumulation or deposit has not been kept longer than is necessary for the purposes of such business or manufacture, and that the best available means have been taken for protecting the public from injury to health thereby."

Sect. 12. "In any case where a nuisance is so ascertained by the local authority to exist, or where the nuisance in their opinion did exist at the time when the notice was given, and, although the same may have been since removed or discontinued, is in their opinion likely to recur or to be repeated on the same premises or any part thereof, they shall cause complaint thereof to be made before a justice of the peace; and such justice shall thereupon issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices, in Petty Sessions assembled at their usual place of meeting, who shall proceed to inquire into the said complaint; and if it be proved to their satisfaction that the nuisance exists, or did exist at the time when the notice was given, or, if removed or discontinued since the notice was given, that it is likely to recur or to be repeated, the justices shall make an order in writing under their hands and seals on such person, owner, or occupier for the abatement or discontinuance and prohibition of the nuisance as hereinafter mentioned, and shall also make an order for the payment of all costs incurred up to the time of hearing or making the

order for abatement or discontinuance or prohibition of the nuisance.”

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Sect. 22. “Whenever any ditch, gutter, drain, or watercourse used or partly used for the conveyance of any water, filth, sewage, or other matter from any house, buildings, or premises is a nuisance within the meaning of this Act, and cannot, in the opinion of the local authority, be rendered innocuous, without the laying down of a sewer, or of some other structure along the same or part thereof or instead thereof, such local authority shall and they are hereby required to lay down such sewer or other structure, and to keep the same in good and serviceable repair.”

Field (Pearce with him), for the respondent.—The appellant is a person who contributes to the nuisance, and therefore the order was properly made on him under sect. 12 of stat. 18 & 19 *Vict. c. 121*. [*Blackburn J. Stat. 13 & 14 Vict. c. 21. s. 4* enacts, that in all Acts the singular shall be deemed and taken to include the plural unless the contrary “is expressly provided;” therefore the word “person” in stat. 18 & 19 *Vict. c. 121. s. 12.* may mean “persons.”] Sect. 33 of this Act provides for the case where a nuisance is caused by the joint act or default of several persons, and empowers the justices to make an order upon all or any number of them. [*Cockburn C. J.* Suppose three persons contribute to a nuisance, an order on one of them to abate it would be pro tanto useful; and the justices are not confined to making an order upon the person on whose premises the nuisance crops up.] This is not a case within sect. 22, which empowers the local authority to enter upon private land and cover a drain or sewer and cause the

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owners or occupiers of the houses which drain into it to contribute to the expense. Also this is not a public sewer, for in 1855 the turnpike trustees cut off the drain from the appellant's premises into it.

Day, for the appellant.—The appellant does not cause the nuisance at the *Sandown* turnpike gate within sect. 12 of stat. 18 & 19 *Vict. c. 121*. [*Mellor J.* The definition of “nuisances” in sect. 8 includes “any accumulation or deposit which is a nuisance or injurious to health.” [*Blackburn J.* Also “any pool, ditch, &c., so foul as to be a nuisance or injurious to health :” this ditch is foul with sewage the principal part of which comes from the appellant's premises.] Further, where several persons contribute to cause a nuisance an order cannot be made upon one of them to abate it. The appellant is exercising his right of drainage into a public sewer. The drain along the turnpike road is public, and must have been constructed by some public authority, for no other would have had a right to make it under a public highway; and it is used generally by the inhabitants. The local authority should have proceeded under sect. 22, and covered over the sewer. [*Cockburn C. J.* The appellant does more than use it for household drainage.]

Cur. adv. vult.

FRANCOMB, appellant, FREEMAN, respondent.

At a Petty Sessions held at *Abergavenny*, in the county of *Monmouth*, an information was preferred by the respondent, the inspector of nuisances for the *Abergavenny* Union, against the appellant, that in and upon certain premises situate at &c. the following nuisance existed, namely, a drain so foul as to be a nuisance and

injurious to health ; and that the nuisance was caused by the act or default of the appellant, the owner of the premises, contrary to the statute.

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The drain in question conveyed the waste water, soap suds, slops and filth from five or six houses and pigsties belonging to the appellant into a small watercourse: at the mouth of the drain was an accumulation of filth, and the water of the watercourse was polluted.

In *November*, 1867, the appellant made the drain to carry the refuse from the houses and pigsties under a private road into the stream instead of allowing it to flow over the surface of the road as it had done for forty years and upwards. The road was a private one and not his property, but he had the consent of the owner to make the drain. The houses and pigsties were let to yearly tenants. The appellant claimed a right to drain the refuse into the stream.

The watercourse originated in a spring in the neighbouring mountain, and after running through the appellant's property pursued a course down the opposite side of the road leading by the houses. At a point a few yards below the houses the drain passing underneath the road joined the watercourse, which then immediately entered premises belonging to a Mr. *Warr*, and, after passing through his other property, fell into a brook. Mr. *Warr* had constructed two wells in the watercourse on his premises, from which his tenants had for five or six years obtained water for drinking purposes. The stream was several years ago diverted by Mr. *Warr* from its original course, which was alongside of his property, and made to pass through the middle of it.

The inspector of nuisances had given the appellant notice to remove the nuisance.

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It was objected on behalf of the appellant. First. That he was neither the owner nor the occupier of the drain or of the road, and that, assuming the alleged nuisance to exist, it was not caused by his act or default but by that of the occupiers of the dwelling houses and pigsties, and they were the persons who should have been summoned. Secondly. That as the question of title was raised by the appellant claiming a right for the refuse to run from the premises in question into the stream, and as the drain and the road under which the drain was made were not his property, the justices had no jurisdiction to determine the complaint.

The justices were of opinion that the drain running into the stream was a nuisance and injurious to health, and, as it had been laid down and constructed by the appellant, decided that the nuisance arose and was caused by his act, permission or sufferance, and that they had jurisdiction to hear and determine the matter of complaint, and they ordered him to abate and discontinue the nuisance.

The questions for the opinion of the Court were. First. Whether the appellant was the right person to be proceeded against under stat. 18 & 19 *Vict. c. 121. s. 12.* Secondly. Whether the jurisdiction of the justices was ousted by the question of title or right.

Harington, for the appellant.—The order should have been upon the occupiers of the houses, who are responsible for the nuisance arising from the use of the drain; *Rich v. Basterfield* (a). The judgment of this Court in *Gander v. Jubber* (b) was disapproved in the Exchequer Chamber though not reversed, for the plaintiff on the

(a) 4 C. B. 783.

(b) 5 B. & S. 78.

recommendation of that Court agreed to a stet processus (a). [*Blackburn J.* referred to *Rex v. Pedly* (b).] Or the order should have been against *Warr*, and he would have a remedy against the appellant. The appellant has an easement to drain into the watercourse, and the drain which causes the nuisance is not upon his land. [*Cockburn C. J.* This is not like an easement to turn filth on a neighbour's land, which casts on him the obligation to remove it.]

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H. James, for the respondent, was not called upon.

COCKBURN C. J. I am of opinion that in both cases our judgment should be for the respondent.

Where a nuisance is caused by the aggregate contribution of several persons, and so that the contribution of each would not by itself be a nuisance, I should hesitate to say it was a case in which the justices could make an order depriving each of the benefit of a common drain. But in the first of the cases before us, independently of the contributions by other persons, the quantity of stuff poured into the drain from the brewery of the appellant by itself created a nuisance. And that being so, the question is whether the fact of the nuisance arising upon a spot away from the appellant's premises and at a different part of the parish prevents the justices from making an order upon him, and whether the proceedings ought to have been against the owner or occupier of the soil where the nuisance exists. I think that according to

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(a) 5 B. & S. 485. 494. See the judgment of the Exchequer Chamber, post, p. 15.

(b) 1 A. & E. 822.

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ance was the nuisance caused or continued? If that cannot be discovered then the owner or occupier of the land on which the nuisance exists must abate it.

LUSH J. A nuisance within stat. 18 & 19 *Vict. c. 121.* may arise either from the condition of the premises or from a pool, ditch, &c., or from the keeping of an animal, or from an accumulation or deposit (sect. 8). Where such a state of things exists the person first to be sought for as responsible is the person whose act, default, permission or sufferance is the proximate cause of the nuisance, that is, without whose act, default, permission or sufferance the nuisance would not exist. In the first case, although the sewage from other premises flowed into the drain which caused the nuisance, yet the refuse sent from the appellant's brewery was the immediate cause of the nuisance. It is a question of fact for the justices, and they so found it. In the second case the accumulation of the filth at the mouth of the drain was caused by the person who constructed the drain for the use of his houses.

Judgment for the respondent in each case.

IN THE EXCHEQUER CHAMBER.

GANDY *against* JUBBER.[*Trin. Vac.* 1865.]

The following judgment was agreed to by ERLE C. J., MARTIN B., WILLES J., CHANNELL B., KEATING J., PIGOTT B. and SMITH J., but was not delivered. See 5 *B. & S.* 485. 494.

This is a writ of error upon a judgment of the Court of Queen's Bench. There is also an appeal from their decision in discharging a rule for entering a nonsuit. Although in form different the real question is the same in both proceedings, and it is whether the alleged causes of action in the third and fourth counts are good in law. The fourth count only differs from the third in alleging consequential damage to the husband, so that substantially the question arises upon the demurrer to the third count.

The third count states that for several years before and at the time of the injury complained of a messuage and area and cellar in front of it which was covered by an iron grating were in the occupation of *Anne Page* as tenant thereof to the defendant from year to year, the reversion thereof then belonging to the defendant, and the tenant was not by the terms of the tenancy under any contract or liability to alter or repair or keep in repair the messuage or area or cellar or the grating; that the messuage was near a public footway, and it was necessary and proper that the grating should be so constructed and kept in good and sufficient repair that persons lawfully using the footway might not be in danger; that the grating had been and was for several years of the tenancy before and continually up to and at the time of the injury in a dangerous state and in a bad and insufficient state of repair so that persons lawfully using the footway had been and were in danger, and that after and whilst it was in such dangerous state the defendant might, as the landlord and reversioner, have determined the tenancy by his own sole act and deed, so that the same might have been determined before the happening of the injury; and the breach is that the defendant did not determine the tenancy, but suffered *Anne Page* to remain tenant without being under any contract or liability by the terms of the tenancy to alter or repair the grating, and the defendant wrongfully and negligently allowed the grating to be and continue in a dangerous state and in bad repair up to and at the time of the happening of the injury, by reason whereof the

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plaintiff (the wife) sustained damage by her leg passing through the grating.

The case in the Queen's Bench will be found reported in 5 *B. & S.* 78.

The argument took place on the rule to enter a nonsuit, and it was admitted by the learned counsel for the defendant that the judgment thereupon determined the demurrer. We are of opinion that the third count is bad in substance, and that the judgment of the Court of Queen's Bench ought to be reversed.

It is obvious upon reading the third count that the state of facts there stated is consistent with this: that several years ago *Anne Page* had become tenant from year to year of the piece of land upon which the messuage is built, whether originally as tenant to the defendant or some other person is not stated; that she had erected the house and grating and continued in the occupation of them, and so far as regards the defendant it is only stated that for several years he had been and was the reversioner and that after the grating got into a dangerous state he might have determined the tenancy by his own sole act and deed, so that it might have been determined by him before the misfortune happened to the female plaintiff; there is no averment that he had notice of the dangerous state of the grating, and for aught that appears he might have been in a foreign country or indeed ignorant that he was owner of the reversion at all.

In a great deal of what fell from the learned Judges in the judgment below we entirely concur. We agree that to bring liability home to the owner, the premises being let, the nuisance must be one which was in its very essence and nature a nuisance at the time of letting, and not something which was capable of being thereafter rendered a nuisance by the tenant, and that it is a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on his premises, at the date of the demise; but that wherein we differ is, that a landlord from year to year having the power of giving the ordinary notice to quit and not giving it is thereby to be held as reletting the premises, and that such forbearing to give notice is equivalent to a reletting.

Three authorities were cited in support of this position; the first is the judgment of *Littledale J.* in *Rex v. Pedly* (a): that was a peculiar case. The evidence of the nature of the tenancies and their commencements was very loose and uncertain; possibly some of them were weekly and the tenants constantly altering. It may be that *Littledale J.* meant to say that in a tenancy from year to year there was a new letting every year, but we should not collect that meaning from his language; we should infer that he meant an actual reletting or renewing

(a) 1 *A. & E.* 822. 827.

of the tenancy. The next authority was *Rich v. Basterfield* (a). We cannot think that the judgment in this case supports the position contended for. The case of *Rez v. Pedly* (b) is there discussed, and *Cresswell* J. in delivering the judgment, p. 804, states his view of Lord *Denman's* judgment, then of that of *Littledale* J., and he says that learned Judge "seems to have rested his judgment on the principle, that the landlord was not to let the land with the nuisance upon it; and he proceeds: 'here, the periods are short, so that there has been a reletting; and that has taken place after the user of the buildings had created the nuisance.' He therefore assumes that there was an existing nuisance at the time of the letting, which had not afterwards been removed. To his judgment, proceeding on that ground, we entirely assent." He then discussed the judgments of the two other Judges and proceeded, p. 805, "If, then, *The King v. Pedly* is to be considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed; or because he had relet them after the user of the buildings had created a nuisance; or because he had undertaken the cleansing, and had not performed it;—we think the judgment right, . . . But, if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised,—we think it goes beyond the principle to be found in any previously decided cases; and we cannot assent to it." The judgment was there for the landlord, and we cannot collect from it that the Court intimated any opinion that in a tenancy from year to year there is an annual or periodical reletting. The only other authority relied on is a passage in a ruling at *Nisi prius* of *Patteson* J. in *Tomkins v. Lawrence* (c). It was in answer to an alleged variance, and he is reported to have said, pp. 731-2, "As a tenancy from year to year is considered as recommencing every year, the allegation that it commenced in 1836, would be made out, even though the tenancy had first begun on some 16th *November*, several years before."

These are the authorities relied on. A tenancy from year to year is an ambiguous expression. It may mean that a landlord lets premises for a year and at the expiration of that year lets them for another year, and so on at the expiration of the second year for a third year, and if this were the real state of things there would be an actual reletting every year, and according to the authorities he would be responsible for any nuisance existing at the time of each letting. But this in point of fact is not the common and ordinary tenancy from year to year, nor is it the one alleged in the third count, which

[1865.]

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(a) 4 C. B. 783.

(b) 1 A. & E. 822.

(c) 8 C. & P. 729.

[1865.]

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is one determinable by the act of the defendant. There frequently is an actual demise from year to year so long as both parties please. The nature of this tenancy is discussed in 4 *Bac. Abr.* tit. *Leases and Terms for Years*, pp. 838, 839, 7th ed., and this article has always been deemed of the highest authority being said to be the work of Chief Baron *Gilbert*. It seems clear that the learned author considered that the true nature of such a tenancy is that it is a lease for two years certain, and that every year after it is a springing interest arising upon the first contract and parcel of it, so that if the lessee occupies for a number of years, these years, by computation from the time past, make an entire lease for so many years, and that after the commencement of each new year it becomes an entire lease certain for the years past and also for the year so entered on, and that it is not a reletting at the commencement of the third and subsequent years. We think this is the true nature of a tenancy from year to year created by express words, and that there is not in contemplation of law a recommencing or reletting at the beginning of each year. But much the more frequent instances of tenancies from year to year are created by implication, partly of fact and partly of law, which necessity and convenience have compelled the Courts to adopt. They differ very much in their circumstances; a very common one is that of a tenant holding over after the expiration of a long lease, he paying and the landlord receiving the old amount of rent as due at the times mentioned in the original lease. He is thereby deemed to have become a tenant from year to year. But whether the same law of liability is applicable in case of a tenancy so created it is unnecessary to decide, inasmuch as we think the third count is bad in substance, because, assuming it to be averred that the defendant let the premises to *Anne Page*, it is not averred either directly or by any reasonable inference that the grating was defective at the time of the letting.

We therefore think the judgment of the Court of Queen's Bench ought to be reversed.

The judgment on the appeal follows, and it will be for the appellant.

1868.

The QUEEN against IRELAND.

Tuesday,
January 15th.

The defendant's name was on the burgess list of a municipal borough unobjected to at the revision in *October*, 1867, and he was elected town councillor on the 1st *November* following. His father received parochial relief in *December*, 1866. Held.

1. That the Court would inquire by quo warranto into the title of the defendant to be on the burgess list.

2. That the defendant was not disqualified from being on the burgess list by the receipt of parochial relief within stat. 5 & 6 *W. 4. c. 76. s. 9.*

Quo warranto.
Town coun-
cillor.
Name on
burgess list.
Receipt of
parochial
relief.
5 & 6 W. 4.
c. 76. ss. 9. 28.

IN *Michaelmas* Term, *November 25*, *Pinder* obtained a rule calling upon the defendant to shew cause why an information in the nature of a quo warranto should not be exhibited against him to shew by what authority he claimed to exercise the office of town councillor of the borough of *Bodmin*; on the ground that he was disqualified from being elected to the office by reason of his having, within twelve months before the last day of *August*, 1867, received parochial relief within the meaning of stat. 5 & 6 *W. 4. c. 76. s. 9.*

The defendant had been for twenty years a rated inhabitant of the borough of *Bodmin*, and on the revision of the burgess lists in *October*, 1867, no objection was made to him, and his name was retained. On the 1st *November*, 1867, he was elected councillor. His father had received out door relief in the Union of *Barnstaple* for several years; but in *December*, 1866, the defendant, who until then had never been asked to support his father, caused his name to be removed from the books of the Union; he then ceased to receive parochial relief, and died on the 24th *February*, 1867.

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Stat. 5 & 6 *W. 4. c. 76. s. 9.*, which enacts that occupiers of houses, &c., rated for three years to the relief of the poor, and residing within the borough or within seven miles of it, shall, if duly enrolled, be burgesses of the borough, contains, among others, the following proviso, "That no person shall be so enrolled in any year who within twelve calendar months next before the said last day of *August* shall have received parochial relief or other alms, or any pension or charitable allowance from any fund intrusted to the charitable trustees of such borough hereinafter mentioned."

By sect. 28, no person shall be "qualified to be elected or to be a councillor or an alderman of any such borough who shall not be entitled to be on the burgess list of such borough."

Baylis shewed cause.—First. The Court will not inquire whether the defendant is rightly on the burgess roll. The machinery for revising the burgess lists is provided by stat. 5 & 6 *W. 4. c. 76. s. 18.*; *Ex parte Hindmarch (a)*. [*Blackburn J.* In that case the Court, as a matter of discretion, would not disturb the defendant on account of the length of time which had elapsed; here was only nine days opportunity for the application for a quo warranto. In *Reg. v. Dixon (b)* it was held no objection to the title of a person who was councillor when elected mayor that he was not on the burgess roll at the time.]

Secondly. The parochial relief intended in stat. 5 & 6 *W. 4. c. 76. s. 9.* does not include parochial relief to all relatives whom a person is liable to support under stat. 43 *El. c. 2. s. 7.* Sect. 53 of stat. 5 & 6 *W. 4. c. 76.*

(a) 8 *B. & S.* 642.

(b) 15 *Q. B.* 33.

imposes a penalty on any person who acts as councillor without being duly qualified at the time of making the declaration, or after he has ceased to be qualified according to the provisions of the Act, or after he has become disqualified to hold the office. [*Lush J.* That is in effect repealed by stat. 6 & 7 *W.* 4. c. 104. s. 7.] Still it may be referred to for the purpose of interpreting sect. 9. There is no provision that a person being on the burgess roll shall not act as a burgess if he receives parochial relief.—The Court then called upon

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Pinder, in support of the rule.—A person whose father has received parochial relief has himself received parochial relief within the meaning of stat. 5 & 6 *W.* 4. c. 76. s. 9. In *Bancroft v. Mitchell* (a) it was held that stat. 43 *El.* c. 2. s. 7. imposed a legal obligation on a son to maintain his parent. [*Cockburn C. J.* In order to create that obligation there must be the intervention of justices, as there was in that case.] In *Trotter*, appt., *Trevor*, respt. (b), where the guardians of the Union (in which both father and son were residing) accepted an offer of the son to pay a weekly sum towards the maintenance of his father, which however was not sufficient for the purpose, it was held that the excess was not parochial relief given to the son within stat. 2 & 3 *W.* 4. c. 45. s. 36. [*Blackburn J.* The language of that section is, "Parochial relief or other alms which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament." *Mellor J.* In that case the son did not discharge the entire obligation of maintaining his father.]

(a) 8 *B.* & *S.* 558.(b) 13 *C. B. N. S.* 48.

1868. **COCKBURN C. J.** There is no ground in point of reason for saying that relief to the father is relief to the son; and stat. 5 & 6 *W. 4. c. 76. s. 9.* does not either expressly or by implication provide that relief to a man's father is relief to himself. There is no authority that a son is bound except morally to maintain his father; a fortiori there is no legal obligation where the father is not residing with him as part of his family. It would be an extravagant construction of sect. 28 to hold the relief given to the father in the present case to be a disqualification of the son.

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BLACKBURN J. I am of the same opinion. Stat. 4 & 5 *W. 4. c. 76. s. 56.* enacts that "all relief given to or on account of the wife, or to or on account of any child or children under the age of sixteen, not being blind or deaf or dumb, shall be considered as given to the husband of such wife, or to the father of such child or children, as the case may be, and any relief given to or on account of any child or children under the age of sixteen of any widow, shall be considered as given to such widow." This seems by implication, if not in express terms, to declare the intention of the Legislature that relief given to the father shall not be considered as relief given to the son.

MELLOR and LUSH JJ. concurred.

Rule discharged, with costs.

1868.

WATERTON *against* BAKER.Thursday,
January 16th.

FIELD Claimant.

County Court.
Appeal.
Time for
giving secu-
rity.
13 & 14 Vict.
c. 61. s. 14.
County Court
Rule 134.

By stat. 13 & 14 *Vict. c. 61. s. 14.* an appeal is given from the determination of the County Court, provided the party appealing shall, within ten days after the determination, give notice of appeal to the other party, and also give security, to be approved by the clerk of the Court for the costs of the appeal. By rule 134 of the Rules and Orders for regulating the Practice of the County Courts, &c., 1857, where a party proposes to give a bond by way of security he shall serve on the opposite party and the Registrar notice of the proposed sureties, and the Registrar shall forthwith give notice to both parties of the day and hour for the execution of the bond, and state in the notice to the obligee that he must then make objection to the sureties. Held, that where an appellant has done all he can do to give security within the ten days, and the delay in doing so is caused by the registrar or respondent, there is a sufficient compliance with sect. 14 and rule 134.

THIS was an appeal from a judgment of the County Court of *Hertfordshire* held at *Watford*. On the case coming on for argument in *Michaelmas* Vacation, *November 27, 1867,*

Codd, for the respondent, objected that the Court would not hear the case as the appellant had not given security pursuant to stat. 13 & 14 *Vict. c. 61. s. 14.* and rule 134 of the Rules and Orders for Regulating the Practice of the County Courts &c., 1857. (See *Pollock's Practice of the County Courts*, App. to Part 1, p. 84, 4th ed.)

Keane appeared for the appellant.

The COURT (MELLOR and LUSH JJ.) said the case ought not to be struck out of the paper without their

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being satisfied whether additional time had been granted by the Judge or the Registrar for perfecting the recognizances.

Jan. 15. Codd now moved for a rule to strike the case out of the paper on the same ground as that on which he had objected to the hearing of the case.

An interpleader summons in this action was heard on the 22nd *October*, 1866, which the Judge took time to consider and adjourned to the 16th *November*. On the 8th *November* the claimant received a notice from the Registrar that the Judge had decided in favour of the plaintiff; and that judgment was entered as of the 22nd *October*. Execution was issued, and the property and effects the subject of the interpleader summons were sold by the bailiff on the 8th *November*. On the 12th the claimant transmitted by post to the Registrar and to the plaintiff's attorney a notice of his intention to appeal. On the 16th he appeared at the County Court and tendered to the Judge for signature the copy of a case which had been prepared by counsel; and it was ordered by the Judge and consented to by the clerk of the plaintiff's attorney that the case should be deemed to have been presented to be signed by the Judge as of that day, that the plaintiff's attorney and the claimant should agree upon the same, and that if they could not agree the Judge should settle and sign the case; the claimant at the same time handed to the Registrar the draft of a bond with the names of two sureties for his approval and paid the sum of 13*l.* 13*s.* the costs mentioned in the order of the 22nd *October*:

on the 18th *November* he received the draft bond duly approved by the Registrar. On the 19th, in compliance with and in the form set forth in the Schedule to the Rules and Orders for regulating the Practice of the County Courts, he sent through the post to the plaintiff's attorney a notice in writing of his proposed sureties; and on the 24th he wrote to him requesting him to return the draft case and inquiring whether he was satisfied with the proposed sureties. On the 28th he received an answer making some inquiries respecting the proposed sureties and stating that he had drawn a fresh case which would be forwarded to the claimant. Immediately on the receipt of this the claimant answered the inquiries respecting the sureties; and on the 13th *December* he received from the plaintiff's attorney the copy of the original draft case and another which the plaintiff's attorney had prepared, with a letter requesting him to forward both to the Judge to settle a case thereupon, which he accordingly did.

On the 17th *January*, 1867, the claimant received notice from the Registrar to execute before him a bond as approved by him on the 21st, which notice also provided that if the plaintiff's attorney should have any valid objection to make to the sureties it was to be made then; and that notice was served upon the plaintiff's attorney. On the 21st the claimant attended with his sureties before the Registrar, who approved of them, and the bond was executed; but the plaintiff's attorney did not attend. On the same day the claimant received from the Registrar the draft case as settled by the Judge, and on the 23rd it was set down for argument,

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and notice thereof with a copy of the case was sent to the plaintiff's attorney.

Codd, in support of the application.—By stat. 13 & 14 *Vict. c. 61. s. 14.* an appeal is given to a party dissatisfied with the determination or direction of the County Court in point of law, “provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party, or his attorney, and also give security, to be approved by the clerk of the Court, for the costs of the appeal,” &c. The giving of such security is a condition precedent to the hearing of the appeal; *Stone*, appt., *Dean*, respt. (a), *Norris*, appt., *Carrington*, respt. (b).

The Court granted a rule nisi.

Keane and *Joyce* shewed cause in the first instance.—In *Stone*, appt., *Dean*, respt. (a), and *Norris*, appt., *Carrington*, respt. (b), the appellant had not taken any step within the ten days. Here the claimant did all that he could to comply with stat. 13 & 14 *Vict. c. 61. s. 14.*, and the delay was occasioned by the opposite party. In *Mayor*, appt., *Harding*, respt. (c), a strict compliance with stat. 20 & 21 *Vict. c. 43. s. 2.*, which enacts that on appeal from a decision of justices the appellant “shall within three days after receiving such case” transmit the same to the Court, was held to be not necessary. [*Mellor J.* There it was impossible for the appellant to do more than he did, for the offices

(a) *E. B. & E.* 504.

(b) 16 *C. B. N. S.* 10.

(c) 16 *L. T. N. S.* 429.

of the Court were closed during the *Easter* holidays (a).]
[He also cited *Andrews v. Elliott* (b).]

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(a) In re MAYOR, appellant, HARDING, respondent.

By stat. 20 & 21 Vict. c. 43. s. 2. a party appealing from the determination of justices shall, within three days after receiving the case, transmit it to the superior Court. A case was received by the appellant on *Good Friday*, who transmitted it to the Court on the following *Wednesday*. Held that, the offices of the Court being closed until *Wednesday*, the case was duly transmitted.

[*Saturday*,
May 11th,
1867.]

20 & 21 Vict.
c. 43. s. 2.
Transmission
of case to
superior Court.

MCMAHON obtained a rule nisi to strike out of the Crown paper a case of *Mayor*, appellant, *Harding*, respondent, stated for the opinion of this Court under stat. 20 & 21 Vict. c. 43. s. 2., on the ground that the provisions of the statute had not been complied with. The appellant, being convicted by certain justices for *Newcastle under Lyne*, applied for a case. The case stated and signed by the justices was received by the attorney for the appellant on *Good Friday*, and was sent to *London* on the following day. But *Good Friday* and *Easter Eve*, as well as *Monday* and *Tuesday* in *Easter* week, being observed as holidays in the offices of the Courts (c), it was not lodged with the officer of this Court until *Wednesday* in *Easter* week.

Kenealy shewed cause.—Stat. 20 & 21 Vict. c. 43. s. 2. gives an appeal from the determination of justices, and directs that the party having applied to the justices to state a case for the opinion of one of the superior Courts “shall, within three days after receiving such case, transmit the same to the Court.” Here it was impossible to transmit the case within the three days, for the offices were closed till *Wednesday*.—He cited *Reg. v. Allan* (d), *Syred*, appt., *Carruthers*, respt. (e), *Woodhouse*, appt., *Woods*, respt. (f), per *Blackburn J.*; *Morgan*, appt., *Edwards*, respt. (g), per *Channell B.*, and was then stopped.

McMahon, in support of the rule.—The transmission of the case within three days is a condition precedent, and if not complied with

(c) See stat. 3 & 4 W. 4. c. 42. s. 43. and R. G. H. T. 6 W. 4 (4 A. & E. 743).

(d) 4 B. & S. 915.

(e) E. B. & E. 469.

(f) 29 L. J. M. C. 149. 150; 6 Jur. N. S. 421. 422.

(g) 5 H. & N. 415. 419.

(b) 5 E. & B. 502.

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By rule 134 of The Rules and Orders for regulating the Practice of the County Courts, &c., 1857, made in

the Court has no jurisdiction to hear the case. [He cited *Bac. Abr. Conditions* (M).] [Mellor J. Where literal performance of a statutory condition is possible, the Court has no discretion to dispense with it. In *Fisher v. Cox* (a), the day before yesterday, we held that a Judge had no more power to make an order in the teeth of the statute for the resealing of a writ which had been allowed to run out than it would have to order the date of an original writ to be altered, and we set aside the writ.] [He cited *Reg. v. Peacock* (b), *Pennell*, appt., *The Churchwardens of Uxbridge*, respts. (c), *Morgan*, appt., *Edwards*, respt. (d).] [Mellor J. Stat. 13 & 14 Car. 2. c. 12. s. 2. gives an appeal against an order to the next Sessions, and the Courts have held next Sessions to mean *next practically possible*, in order that the appellant might have the possibility of exercising his right. See *Reg. v. The Justices of Sussex, in error* (e).]

MELLOR J. As regards the conduct of the parties, the transmission of the case within three days, and the giving notice of appeal, may be conditions precedent which they could not waive by consent, but they are not conditions precedent to the jurisdiction of the Court to hear the appeal. Also, where a statute imposes a condition precedent, it must be strictly adhered to; but if an enactment is directory only, the Court may relax it. Here the jurisdiction of the Court attaches on the case being stated. And stat. 20 & 21 Vict. c. 43. s. 2. must mean that the case should be transmitted within three practicable days, just as in stat. 13 & 14 Car. 2. c. 12. s. 2. the next Sessions means the next practicable Sessions. In the present case none of the three were practicable days. When compliance with an enactment is impossible, as in this instance by reason of the offices of the Courts being closed, we should be straining the words if we deprived the party of his right to appeal by reason of his not having done what was impossible.

SHKE J. concurred.

Rule discharged (f).

(a) 16 L. T. 397.

(b) 4 C. B. N. S. 264.

(c) 31 L. J. M. C. 92; 8 Jur. N. S. 99.

(d) 5 H. & N. 415.

(e) 4 B. & S. 966. 978.

(f) See *In re Banks*, appt., *Goodman*, respt., 3 B. & S. 548, pl. 2.

pursuance of stat. 19 & 20 *Vict. c.* 108. *s.* 32. (see *Pollock's Practice of the County Courts*, Appendix to Part 1, p. 84, 4th ed.), "In all cases, where a party proposes to give a bond by way of security, he shall serve, by post, or otherwise, on the opposite party and the Registrar, at his office, notice of the proposed sureties in the forms set forth in the Schedule, and the Registrar shall forthwith give notice to both parties of the day and hour on which he proposes that the bond shall be executed, and shall state in the notice to the obligee that should he have any valid objection to make to the sureties, or either of them, it must then be made." The Registrar would not make an appointment for the execution of the bond until he had approved the sureties, and that might happen to be not within the ten days.

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Codd, in support of the rule.—Rule 134 of The Rules and Orders for regulating the Practice of the County Courts, &c., 1857, is to be read as part of stat. 13 & 14 *Vict. c.* 61. and does not repeal sect. 14; therefore the security must be given and approved by the Registrar within ten days. In *Morgan*, appt., *Edwards*, respt. (a), it was held that, under stat. 20 & 21 *Vict. c.* 48. *s.* 2., the giving notice of appeal with a copy of the case to the respondent within three days was a condition precedent to the right of the appellant to have the case heard (b).

COCKBURN C. J. This rule must be discharged. It is enacted by sect. 14 of stat. 13 & 14 *Vict. c.* 61., that where a party intends to appeal from the decision of the Judge of the County Court he shall, within ten

(a) 5 *H. & N.* 415.

(b) See *Chapman v. Robinson*, 1 *E. & E.* 25.

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days after the decision, give notice of such appeal to the other party or his attorney, "and also give security, to be approved by the clerk of the Court, for the costs of the appeal," &c. Looking at the 134th rule of the Rules and Orders for regulating the Practice of the County Courts, made under stat. 19 & 20 *Vict. c. 108. s. 32.*, we may properly read the words "give security" as meaning "offer security which is afterwards accepted as good and sufficient." In the cases of *Stone*, appt., *Dean*, respt. (a), and *Norris*, appt., *Currington*, respt. (b), the appellant had taken no step until after the ten days had elapsed, but here the judgment of the County Court was not finally or formally given so as to be the subject of appeal until the 16th *November*, and on that day the attorney for the appellant tendered the draft of a bond with the names of the proposed sureties, having previously given notice of his intention to appeal. That is a sufficient compliance with the statute so far as giving notice to the registrar is concerned. Then, in compliance with rule 134, the attorney for the appellant having given notice to the plaintiff's attorney of his intention to appeal, gave him notice on the 19th of the names of the proposed sureties; and he, as he was warranted in doing, required further information as to them, and took time to inquire whether they were satisfactory to him. But the lapse of that time was not the act of the claimant, who had within the ten days given the names of good and sufficient securities, for they were afterwards accepted as such. It would be hard and unreasonable that a party should be ousted of the remedy which the statute intended he should have by appeal because the Registrar requires time to make inquiries or delay arises from

(a) *E. B. & E.* 504.

(b) 16 *C. B. N. S.* 10.

his sickness or inability to complete the matter, and still more if the delay is occasioned by the opposite party requiring time to make inquiries.

The reasonable construction of the 14th section is, that if the appellant does all that lies on him to do within the ten days, and afterwards completes the security, he is entitled to appeal : and this construction does not encroach on the decisions.

MELLOR J. The language of sect. 14 of stat. 13 & 14 *Vict. c. 61.* differs from that of sect. 3 of stat. 20 & 21 *Vict. c. 43.* : the giving notice of appeal and security within the prescribed time may be in the former, in which it is introduced by way of proviso, a condition precedent to the right of appeal, though not in the latter. Still the direction in the latter is to be complied with in a reasonable manner ; and the 134th rule of the Rules and Orders regulating the Practice of the County Courts enables us to say that the appellant has done all that he could do to entitle him to appeal.

SHEE J. The object of sect. 14 of stat. 13 & 14 *Vict. c. 61.* is to give an appeal to the unsuccessful party, and to secure the costs of the appeal to the successful one. The former is to give notice of appeal within ten days ; and the 134th of the Rules and Orders regulating the Practice of the County Courts provides that notice of the proposed sureties shall be given to the opposite party and to the Registrar. If the unsuccessful party gives these notices, and the sureties are approved by the Registrar when the bond is entered into, he has done all that he can to entitle him

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to appeal. The words in sect. 14, "to be approved," imply that the person who is to approve shall have reasonable time to inquire whether the sureties are such as he ought to approve, and the successful party also must have some time to inquire into their sufficiency.

LUSH J. The cases of *Stone*, appt., *Dean*, respt. (a), and *Norris*, appt., *Carrington*, respt. (b), decide that security as well as notice of appeal must be given within ten days. But they do not determine the present case, because there the appellant took no step within the ten days to give security. Here the appellant within the ten days gave notice of the proposed sureties, and would have perfected the security within that time but for the delay occasioned by the opposite party. The sureties were afterwards accepted by the Registrar, and therefore the appellant was ready to give the security within the ten days. If this were not sufficient it would always be in the power of the successful party to prevent an appeal by objecting to the proposed sureties.

Rule discharged.

(a) *E. B. & E.* 504.

(b) 16 *C. B. N. S.* 10.

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The QUEEN, on the prosecution of the Vestry of
ST. GEORGE, HANOVER SQUARE, *against* McCANN
and another.

[Saturday,
June 13th.]

Poor rate.
Exemption of
Crown, &c.
Bridge built
under 9 & 10
Vict. c. 39.
Occupation
by Commis-
sioners of
Works and
Public Build-
ings.

Stat. 9 & 10 *Vict. c. 39.*, which recited that Commissioners for improving the Metropolis had recommended the construction of a bridge over the *Thames*, near *Chelsea*, and that the Commissioners of Woods and Forests had caused plans of the intended bridge to be made, which had been approved by the Commissioners for the Treasury, constituted the Commissioners of Woods and Forests a corporation for the purpose of constructing the bridge, and empowered them to obtain a loan from the Commissioners for issuing Exchequer Bills for Public Works, the repayment to be secured by an assignment of the tolls which the Commissioners of Woods and Forests were authorized to take. The tolls were to be applied in payment of all expenses of the management and collection of the tolls, in maintaining the bridge, and in repayment of all advances and expenses made or paid for out of the Consolidated Fund. The bridge was constructed and vested in the Commissioners of Woods and Forests, and by stat. 14 & 15 *Vict. c. 42.* in the Commissioners of Works and Public Buildings, to whom their duties and powers were transferred; and the tolls taken exceeded the cost of maintaining the bridge. By stat. 21 & 22 *Vict. c. 66. s. 2.*, when the sum borrowed from the Consolidated Fund should be paid off, no toll was to be taken for foot passengers. Held, by the Queen's Bench and affirmed by the Exchequer Chamber, that the occupation of the bridge was in the Commissioners of Works and Public Buildings as servants of the Crown, or at least in consimili casu, and therefore they were not rateable to the poor rate.

MANDAMUS to the defendants, two justices for the county of *Middlesex*. The writ recited that by stat. 9 & 10 *Vict. c. 39.* it was recited that the Commissioners appointed to inquire into and consider the most effectual means of improving the Metropolis and of providing increased facilities of communication between the same, did, by their report made on the 23rd *July*, 1845, recommend the construction of a suspension bridge across the river *Thames* between *Battersea* and *Vauxhall Bridges*, from a point near *Chelsea Hospital*, on the north side, to a point near the public house called *The Red House*, on the south side, and that the Commissioners of Woods, Forests, Land Revenues, Works and

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Buildings had caused surveys, plans and designs to be made of the intended bridge and the approaches thereto, and that such surveys, plans and designs had been approved by the Commissioners of the Treasury; that by sect. 1 the Commissioners of Woods, Forests, Land Revenues, Works and Buildings for the time being were constituted a corporation by the name and style of "The Commissioners of Her Majesty's Woods, Forests, Land Revenues, Works, and Buildings," in order to enable them to execute and carry into effect the several powers and purposes of that Act; that by sect. 2 the Lord High Treasurer, or the Commissioners for executing that office, were empowered for the purposes of that Act to authorize the Commissioners for issuing Exchequer Bills for Public Works to advance and lend to the Commissioners for executing that Act any sum or sums of money in Exchequer bills not exceeding in the whole the sum of 120,000*l.*, the repayment of those advances to be secured by an assignment of the tolls of the bridge thereafter authorized to be taken, &c.; that by sect. 3 the Commissioners for executing the Act were, upon certain terms and under certain conditions therein stated, empowered to construct and complete a bridge across the river *Thames* at the place and from and to the respective points before mentioned, with convenient approaches thereto, together with convenient piers, stairs, hards and landing places, according to the surveys, plans and designs, and the bridge, together with the approaches thereto, was to be kept in repair by the Commissioners for executing that Act out of the tolls and other moneys coming to them under the Act; that they were empowered by sect. 9 to appoint clerks and other officers, &c.; and by sect. 69 to erect toll gates on the bridge and toll houses near the same, and to take and

demand tolls at such gates for any foot passenger, or any horse, mule, ass, or other beast, or any coach, waggon, cart, or other vehicle; that by sect. 112 all tolls received by virtue of that Act were to be applied by the Commissioners for executing the same in payment of all expenses of the management and collection of the tolls, and in the next place in keeping and maintaining, amongst other structural works and improvements, the bridge, and in the next place in payment of all advances, costs and other expenses made or paid for by the State out of the Consolidated Fund or otherwise in and towards the works and improvements thereby authorized to be made, and the surplus, if any, to form a fund for such Metropolitan improvements as the Legislature should determine; that by stat. 9 & 10 *Vict. c. 83. s. 1.* the Commissioners for the Issue of Loans for Public Works and Fisheries, &c., for the time being, were empowered to make loans to the Commissioners of Woods, Forests, Land Revenues, Works and Buildings for the time being, and also to the Commissioners (who were incorporated by several Acts for effecting improvements in the Metropolis) in money in lieu of Exchequer bills; that by stat. 14 & 15 *Vict. c. 42. s. 22.* the duties, rights and powers of the Commissioners of Woods, Forests, Land Revenues, Works and Buildings were vested in the Commissioners of Works and Public Buildings, who were constituted a corporation by the name of "The Commissioners of Her Majesty's Works and Public Buildings"; and by sect. 27 all the lands, tenements, hereditaments and property which at the commencement of that Act were vested in the Commissioners of Woods, Forests, Land Revenues, Works and Buildings, under or for the purposes of stat. 9 & 10 *Vict. c. 39.*, were

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1868. vested in the Commissioners of Works and Public
 Buildings; that by stat. 21 & 22 *Vict. c. 66.* it was
 recited that the Commissioners for carrying stat.
 9 & 10 *Vict. c. 39.* into execution had borrowed upon
 certain securities from the Commissioners for the
 Issue of Loans for Public Works and Fisheries, &c., the
 sum of 80,000*l.* for the purpose of executing the works
 by that Act authorized, which, together with interest
 thereon, was still due on the 31st *March*, 1858, and
 that by sect. 1 so much of stat. 9 & 10 *Vict. c. 39.* as
 directed that the surplus, if any, of the money arising
 from tolls by that Act authorized to be taken, &c.,
 should form a fund for Metropolitan improvements, was
 repealed; and by sect. 2 when the sum of 80,000*l.* and
 interest should have been paid off no toll was to be
 taken for foot passengers passing over *Chelsea Bridge*.
 The writ further recited that under and by virtue of
 the Acts before mentioned the bridge had been con-
 structed and completed, with convenient approaches,
 piers, stairs, hards and landing places, according to the
 surveys, plans and designs, and was opened to the
 public; and toll gates had been erected and were still
 maintained on the bridge, and tolls were taken for and
 in respect of pedestrian and other traffic over the bridge;
 and those tolls, at the time of the making of the rate
 after mentioned, exceeded in amount and always had
 exceeded the costs and expenses of keeping and main-
 taining the bridge and incidental thereto. And that
 the moneys received and taken under and by virtue of
 those Acts at the time of making the rate exceeded and
 have always exceeded in the aggregate the costs and
 expenses of keeping and maintaining the works and
 improvements done and made under and in pursuance
 of the powers and provisions of those Acts. And the

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bridge and approaches, and other works connected therewith and appurtenant thereto, on the completion thereof, became vested in and had ever since been in the possession and under the controul and management of the Commissioners of Works and Public Buildings in their corporate capacity under and by virtue and for the purposes of those Acts. That the Commissioners of Works and Public Buildings in their corporate capacity were under and by virtue of those Acts, and not otherwise, beneficial occupiers of the bridge and works appurtenant thereto, and as such occupiers were liable to be rated to the relief of the poor and for other purposes of the parish of *St. George, Hanover Square*, in the county of *Middlesex*. That part of the bridge and approaches is situate within the parish of *St. George, Hanover Square*. That by virtue of a local paving and lighting Act, 7 G. 4. c. cxxi. ss. 58. 71., and The Metropolis Management Act, 1855, 18 & 19 Vict. c. 120., the vestry of the parish of *St. George, Hanover Square*, which was incorporated by stat. 18 & 19 Vict. c. 120. s. 42., on the 29th March, 1866, made a rate for the relief of the poor and other purposes, by which rate the Commissioners of Works and Public Buildings were assessed as occupiers of the bridge at the sum of 135*l.* 8*s.* 4*d.*, in respect of so much of the bridge as is within that parish; and that payment of 101*l.* 11*s.* 3*d.*, being the proportion of the rate due and unpaid, had been demanded and payment refused; and that on a summons for non-payment the defendants refused to issue their warrant. The writ then commanded them to issue their warrant to levy by distress and sale of the goods and chattels of the Commissioners of Works and Public Buildings the sum of 101*l.* 11*s.* 3*d.*

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Return. That the Commissioners of Works and Public Buildings were appointed and constituted under, and all their rights, powers, duties, liabilities, interests, exemptions and privileges in reference to the bridge and works were conferred and imposed upon them by, the several Acts of Parliament in the writ mentioned, and that save and except and in so far as the Commissioners were, if at all, in possession or occupation of the bridge and works under or by virtue of the several Acts, or by virtue of those Acts liable, if at all, to be rated in respect thereof, the Commissioners never were in possession or occupation of the bridge and works, nor had they beneficial occupation or other occupation of the bridge or works, nor were they liable to be rated in respect thereof; that, towards the erection of the bridge and execution of the other works in stat. 9 & 10 *Vict. c. 39.*, Parliament made free or net grants from the Consolidated Fund of the *United Kingdom* to the amount of 127,149*l.* 5*s.* 2*d.*, and authorized loans by the Commissioners for issuing Exchequer bills for public works not exceeding 120,000*l.*, at interest not exceeding 4 per cent. per annum, and that of the sum of 80,000*l.* borrowed under the authority as within and in stat. 21 & 22 *Vict. c. 66.* mentioned not more than 13,500*l.* had been repaid at the time of making the rate, and that towards the repayment of that sum not more than 2500*l.* had been received from the tolls and proceeds of the bridge; and thereupon it was submitted, on behalf of the Commissioners of Works and Public Buildings, and the defendants adjudged and determined, that the Commissioners were not liable to be rated as occupiers of the bridge and works.

Demurrer, and joinder.

This case was argued and decided in the Queen's Bench on *January* 18th.

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Keane (*Streeten* with him), for the prosecution.—The effect of stat. 9 & 10 *Vict. c. 39.* is to make certain persons who are the servants of the Crown a corporation for the purposes of that Act, among which is the building of *Chelsea Bridge*. The Commissioners of Woods and Forests were named in the Act because it was convenient that the persons empowered to carry it out should be a corporation, and in carrying it out they ceased to be servants of the Crown and were mere trustees. They are owners of the bridge, landing places, and so much of the soil as is necessary for maintaining the bridge (he referred to sects. 12, 59, 68, 106, 111), and therefore the case is within *The Mersey Docks and Harbour Board Trustees v. Cameron*, and *Jones v. The Mersey Docks and Harbour Board Trustees* (a), where Lord *Chelmsford* said, p. 521, "Under the words of the 43rd *Elizabeth*, every occupier of a tenement yielding profit, is within the rating clause of the statute, although the tenement be a public work for the general good of the realm, and the profit be directed to be applied exclusively to its maintenance;" and Lord *Cranworth*, p. 508, "To avoid all misconception I wish to add that there are certain cases to which the observations I have made do not apply. The Crown not being named is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown or by servants of the Crown for the purposes of the Crown are not liable to be rated." But according to sect. 115 this bridge is not erected entirely out of public money; and, if it were, it is not erected for the pur-

(a) 11 *H. L. C.* 443

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poses of the Crown but for the convenience of a portion of the inhabitants of *Middlesex* and *Surrey*. [*Blackburn* J. This is as much in the occupation of the Crown as a farm would be which the Crown purchased and added to *Windsor Park*. *Lush* J. The rate if levied would be paid out of the sum raised by the public taxes. '*Blackburn* J. And therefore would intercept money which would otherwise go into the purse of the nation.] [He cited *Reg. v. Lady Emily Ponsonby* (a), *Reg. v. Sir Martin Shee* (b), *De la Beche and others*, appts., *The Vestrymen of St. James, Westminster*, respts. (c).]

The Attorney General, Sir J. B. Karlake (*M^r Mahon* with him), for the defendants, was not called upon.

BLACKBURN J. The principle which governs this case is very plain. Since the decision in the *Mersey Docks Cases* (d) every occupier of property from which profit is derived is rateable in respect of it without regard to the purposes to which the profits are appropriated, but there is an exception of the Crown, the Crown not being mentioned in stat. 43 *El. c. 2*. Therefore if property is occupied by the Crown or by some person as servant of or trustee for the Crown there is to be no rate on the occupier; as in *Lord Amherst v. Lord Sommers* (e), where a servant of the Crown took a lease of premises to be used as barracks. That principle, so far from being overthrown in the *Mersey Docks Cases* (d), was affirmed. The opinion of the majority of the Judges in that case was drafted by me, and the language of the passage which I am about to read was partially altered to

(a) 3 Q. B. 14.

(c) 4 E. & B. 385.

(b) 4 Q. B. 2.

(d) 11 H. L. C. 443.

(e) 2 T. R. 372.

meet the views of the other Judges, so that it does not merely theoretically but practically represent the opinion of the Judges. After stating, p. 464, that "where a lease of private property is taken in the name of a subject, but the occupation is by the Sovereign or her servants on her behalf, the occupation being that of Her Majesty, no rate can be imposed," the opinion proceeds, "So far the ground of exemption is perfectly intelligible, but it has been carried a good deal farther, and applied to many cases in which it can scarcely be said that the Sovereign or the servants of the Sovereign are in occupation. Long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of state, such as the Post Office, the Horse Guards, or the Admiralty, in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police; to county buildings occupied for the Assizes, and for the Judges' lodgings; or occupied as a County Court; or for a jail. In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered *in consimili casu*. And the decisions are uniform, and were not disputed at the bar, that the exemption applies so far."

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This exposition of the law is perfectly right. Mr. *Keane's* argument is, that where property is held for Government purposes such as, to use the old language, *spectant regem*, the occupation is treated as if it were the actual occupation by the servants of the Crown; and if the purposes are not those which *primâ facie* are Government purposes the property is rateable. But that is not borne out either by the *Mersey Docks Cases (a)*, or the previous decisions. The whole scheme of stat. 9 & 10 *Vict. c. 39.*, which was for a purpose in its nature local or private, and not one of those *quæ spectant regem*, is that the undertaking is to be carried out, not by private enterprise or a private body, but by the Government and by a charge on the Consolidated Fund. The Commissioners of Works and Buildings are constituted a special corporation for the purpose, and invested with powers to raise money by taking tolls which, no doubt, would make the occupation *primâ facie* beneficial, but these powers are solely and exclusively for maintaining the bridge and repaying the advances made by the Government, and the surplus, if any, is to form a fund for such Metropolitan improvements as the Legislature may direct. That indeed was very unnecessary, because it might have been so applied without any express sanction from the Legislature, and it has been repealed. Should there be any surplus arising from the tolls, it will be held by the Commissioners not for their own benefit but in trust for the Consolidated Fund. Consequently the occupation of the Commissioners, though not for Government purposes, is *de facto* an occupation by them as servants of the Crown; or at least in *consimili casû*. It is like an occupation which the Sovereign has of his private estates. This is not

(a) 11 *H. L. C.* 443.

new law, but was laid down in *De la Beche and others*,
appts., *Vestrymen of St. James, Westminster*, respts. (a).

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MELLOR J. When the *Mersey Docks Cases* (b) were before the House of Lords *Byles J.* dissented from the other Judges, which made it the more important that accuracy should be attained in the opinion expressed by the majority. I joined in the opinion delivered by my brother *Blackburn*, and it underwent considerable discussion among the Judges. They intended to interfere with the previous cases only so far as to hold that, where the occupation of property is beneficial although the profit is ultimately appropriated to charitable or other public objects, still the property is rateable because it does not derive exemption in virtue of the principle which governs the construction of stat. 43 *El. c. 2.*, viz., that the Crown not being named in it is not bound by it. This bridge is *de facto* occupied by the servants of the Crown, who for the purpose of its erection were created a corporation; and though the object is local and private, being for the benefit of a particular district, it is built with the funds of the Crown, the tolls are applied to the repayment of the advances, and the surplus, if any, is to go back to the Consolidated Fund.

LUSH J. Every argument of Mr. *Keane* would equally apply to make the Post Office and every other national establishment rateable.

BLACKBURN J. In deciding that the return is sufficient we do not infringe the rule that the justices, in issuing their warrant to enforce a poor rate, are performing a ministerial act, and that, upon an application

(a) 4 *E. & B.* 385.(b) 11 *H. L. C.* 443.

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to them for that purpose, an objection cannot be set up which might be taken on appeal against the rate (a). Here was no jurisdiction to make the rate, and therefore the case is within the principle of *Milward v. Caffin* (b). The mandamus was a convenient course for raising the question and obtaining the opinion of a Court of error if the parties should be so advised.

Judgment for the defendants.

Error having been brought on this judgment the case was now argued ; before KELLY C. B., BYLES and SMITH JJ., and BRAMWELL and CHANNELL BB.

Keane (*Streeten* with him), for the prosecution, contended that there was nothing in the case to shew that this property was not rateable. [He referred to *The Mersey Docks and Harbour Board Trustees v. Cameron and Jones v. The Mersey Docks and Harbour Board Trustees* (c), *Lord Amherst v. Lord Sommers* (d), *Rex v. Hurdis* (e), *Eckersall v. Briggs* (f), *The Governor, &c., of the Bristol Poor v. Wait* (g), *Reg. v. The Guardians of the Wallingford Union* (h), *Reg. v. Temple* (i), *De la Beche and others, appts., The Vestrymen of St. James, Westminster, respts.* (j), *Reg. v. The Inhabitants of Sherford* (k), *Reg. v. The Inhabitants of St. Martin, Leicester* (l).]

(a) See *Reg. v. The Justices of Kingston upon Thames*, *E. B. & E.* 256. *Ex parte May*, 2 *B. & S.* 426. 428.

(b) 2 *W. Bl.* 1330.

(d) 2 *T. R.* 372.

(f) 4 *T. R.* 6.

(h) 10 *A. & E.* 250.

(j) 4 *E. & B.* 385.

(c) 11 *H. L. C.* 443.

(e) 3 *T. R.* 497.

(g) 5 *A. & E.* 1.

(i) 2 *E. & B.* 160.

(k) 8 *B. & S.* 596.

(l) 8 *B. & S.* 536.

The Attorney General, Sir J. B. Karslake (M'Mahon with him), for the defendants, was not called on.

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KELLY C. B. In this case a rate was made in respect of a bridge on a body of Commissioners who under certain Acts of Parliament are constituted a corporation for the purpose of constructing and keeping it up. It appears that certain other Commissioners had reported to the Crown in favour of constructing a bridge on the spot in question, whereupon a statute was passed authorizing the Commissioners by means of funds to be provided by the Crown to construct the bridge and to receive the tolls on the same, which were in the first instance to be applied in payment of all expenses connected with the works, and in the next place in repayment of advances made by the State, the surplus, if any, to be applied for a particular specified purpose. The question is, whether the Commissioners are rateable with respect to these tolls. I think they are not, and on this plain ground, that the occupation of this bridge is not a beneficial occupation—it is not an occupation by any individual or body of persons either for private or public purposes, but it is an occupation by the Crown, or by a department of the Government as representing the Crown, for the service of the Crown. This is the exception to the liability to being rated which was specially made in the judgment of the House of Lords in the cases of *The Mersey Docks and Harbour Board Trustees v. Cameron and Jones v. The Mersey Docks and Harbour Board Trustees* (a). It is the same as if this had been a matter relating to the navy, in which case the Board of Admiralty would not have been rateable, or relating to trade, in which case the Board of Trade would not have been rateable. Here

(a) 11 H. L. C. 443.

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the matter is committed to the hands of that department of the Government which contracts for the execution of works connected with the land or other property of the Crown, viz., the Commissioners of Woods and Forests, who for that reason and that reason only are made a corporation. They enter into occupation and construct the bridge in question, and under the statute are entitled to receive certain tolls. In what character and on whose behalf do they occupy? Certainly not on their own account, but simply because they are that department of the Government to whom the execution of such works is committed.

When we look at the form of this case it may be observed that it is a mandamus to justices of the peace to issue their warrant to enforce the rate by distress and sale of the goods and chattels of the Commissioners. These Commissioners do not and they cannot possess goods or chattels to the value of 1s. except as belonging to the Crown. Under these circumstances we are asked to direct the justices to seize the property of the Crown.

The rest of the Court concurring,

Judgment affirmed.

Saturday,
January 18th.

Merchant
Shipping Act,
1854, 17 & 18
Vict. c. 104.
ss. 257, 525(1).
Enticing sea-
man to desert.
Limitation of
time for pro-
ceeding.
Non-observ-
ance of for-
malities.

AUSTIN, appellant, OLSEN, respondent.

The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104., sect. 257, imposes a penalty for persuading or attempting to persuade any seaman to desert from his ship: by sect. 525 (1) no conviction for any offence shall be made in any summary proceeding "unless such proceeding is commenced within six months after the commission of the offence; or if both or either of the parties to such proceeding happen during such time to be out of the *United Kingdom*, unless the same is commenced within two months after they both first happen to arrive or to be at one time within the same." Held,

1. That "parties to such proceeding" meant the person committing the offence and the person aggrieved, and that if either left the *United*

Kingdom during the six months, an information might be laid within two months after his return and both parties were at one time within the *United Kingdom*.

2. That the offence in sect. 257 might be committed where the seaman is colourably bound by the agreement, though all the formalities required by sect. 150 in the engagement of the seaman had not been observed.

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CASE stated by justices under stat. 20 & 21 *Vict.*
c. 43.

On the 19th *November*, 1866, the appellant, a licensed shipping agent at *Cardiff*, was convicted by two justices there on an information under The Merchant Shipping Act, 1854, 17 & 18 *Vict.* c. 104. s. 257., charging that he unlawfully attempted to persuade the respondent, a seaman lawfully engaged to serve on board a *British* ship called the *England's Rose*, to neglect to join his ship.

On the 4th *April*, 1866, the respondent signed an agreement at the office of a ship broker at *Cardiff* to serve as a seaman on board that ship as a substitute for one of her crew, who had deserted. Shortly afterwards, about 5 o'clock in the afternoon of the same day, the respondent was asked by the appellant to join a ship called the *Etta*. He refused, stating that he had shipped in the *England's Rose*. The appellant repeated his request but without success, and the respondent sailed the next morning, but at what exact time the evidence did not shew. He returned to *England* at the end of *October*, 1866, having been continually absent since he sailed from *Cardiff* on the 5th *April*.

The information was laid on the 14th *November*, 1866.

At the hearing the appellant took the preliminary objection that the information was not laid in due time, inasmuch as the respondent, one of the parties, was at the time of the commission of the offence, and for some time after, not out of the *United Kingdom*, and ought therefore to have commenced his proceedings within six months from the 4th *April* in pursuance of sect. 525.

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The justices considered that as the respondent could not have stayed in this country to institute his proceedings without in some way more or less disadvantageous to him putting an end to his contract to serve in the *England's Rose*, and, considering that, except for a very short time, probably not so much as twenty-four hours, he was actually out of the *United Kingdom* for the whole period of six months, the case might be held to be within the last clause of sect. 525, and consequently that the information being laid within the allowed period of two months was in time.

It was also contended that the respondent was not a seaman lawfully engaged to serve as a substitute in the *England's Rose* within the meaning of sects. 243 and 257 ; that, it being impracticable, as was shewn, to engage the respondent before the Superintendent of Mercantile Marine or his deputy, the agreement should have been read over and explained to him as well as signed in the presence of an attesting witness in pursuance of sect. 150 (4). The signing was proved, but there was no evidence of the reading and explaining (a). The justices presumed the latter formality to have been observed, and held that the agreement was lawfully made.

By The Merchant Shipping Act, 1854, 17 & 18 *Vict.* c. 104. s. 150., "In the case of all foreign going ships, in whatever part of Her Majesty's dominions the same are registered, the following rules shall be observed with respect to agreements ; (that is to say,)"

(a) "Where a deed is produced, purporting to have been executed in due form by signing, sealing, and delivery, but the attesting witnesses can only speak to the fact of signing, it may be properly left to the jury to presume a sealing and delivery." *Best Ev.* 472, 4th ed. ; 1 *Tayl. Ev.* 159, 5th ed.

“(4.) In the case of substitutes engaged in the place of seamen who have duly signed the agreement, and whose services are lost within twenty-four hours of the ship’s putting to sea by death, desertion, or other unforeseen cause, the engagement shall, when practicable, be made before some shipping master duly appointed in the manner hereinbefore specified ; and whenever such last mentioned engagement cannot be so made, the master shall, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over and explained to the seamen ; and the seamen shall thereupon sign the same in the presence of a witness, who shall attest their signatures.”

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Sect. 243. “Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offences he shall be liable to be punished summarily as follows ; (that is to say,)” &c.

By sect. 257, “Every person who by any means whatever persuades or attempts to persuade any seaman or apprentice to neglect or refuse to join or to proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, shall for each such offence in respect of each such seaman or apprentice incur a penalty not exceeding 10*l*.”

Sect. 525 (1). “No conviction for any offence shall be made under this Act in any summary proceeding instituted in the *United Kingdom*, unless such proceeding is commenced within six months after the commission of the offence ; or if both or either of the parties to such proceeding happen during such time to be out of the *United Kingdom*, unless the same is commenced within two months after they both first happen to arrive or to be at one time within the same.”

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The case was argued first in *Easter Term, May 8, 1867*, before COCKBURN C. J., SHEE and LUSH JJ., by

Waddy, for the appellant.—First. The information is barred, not having been laid within six months. The second clause of sect. 525 allows a further time “if both or either of the parties to such proceeding happen during such time to be out of the *United Kingdom*,” that is, “during the whole of the six months.” [*Shee J.* That cannot be the meaning, for the offence is committed within the *United Kingdom*. *Lush J.* The meaning must be if both parties are not *practically* present within the *United Kingdom*. Suppose the accused is going away, and is gone before service of the summons; or suppose the offence committed so late on one day, and both parties go away so early on the next, that a summons cannot be applied for, if the latter clause of sect. 525 (1) does not apply unless both are *physically* out of the *United Kingdom* the offending party will escape punishment.] In a civil action where the time of limitation once begins to run it does not stop. [*Lush J.* That depends on the language of the statute. *Cockburn C. J.* This clause must have a reasonable construction; it cannot apply where it was impossible to obtain a summons on the day of the offence.] The justices have not stated that it was impossible. [*Lush J.* I infer from the case as stated that the respondent could not have stayed long enough to institute proceedings.]

The case was remitted in order that the justices might find whether, with reference to the times of the solicitation, of the vessel sailing, and of the sitting of magistrates to grant summonses, it was practicable for the respondent to have commenced proceedings before he sailed.

The justices restated the case by adding the evidence taken before them, which did not give any information as to the time.

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In *Michaelmas* Term, November 11, an application by *Waddy* that the case might be sent back to be reheard was refused.

Waddy, for the appellant.—As to the first objection. He referred to sect. 518 (3) for the recovery of penalties, and said that the point was not touched by The Merchant Shipping Amendment Act, 1862, 25 & 26 *Vict.* c. 63.

Secondly. The respondent was not a seaman lawfully engaged on board the *England's Rose* within sect. 243 (4) of stat. 17 & 18 *Vict.* c. 104. [He referred to sect. 150 (4).]

The respondent did not appear.

BLACKBURN J. The objections cannot prevail.

As to the first. Sect. 525 of stat. 17 & 18 *Vict.* c. 104. is not so clear and well worded as it ought to be. [His Lordship read it.] What is meant by the words “both or either of the parties to such proceeding”? Literally the complainant or the person in whose name the information is laid is a party to the proceeding, as the right to inform is not confined to the party aggrieved. But that construction would lead to the gross absurdity that a man who had been out of the *United Kingdom* for ten years might be a party to the proceeding. I think the word “parties” must mean the person committing the offence and the person aggrieved. Here, however, that question does not directly arise, for the person against whom the offence was committed is the party

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informing. Then as to the limitation of time, which is a question of some importance. If it happen that during the six months, which cannot mean during the whole of the time, but during the currency of the six months, either of the parties goes out of the *United Kingdom*, proceedings may be commenced within two months after the time when they both first happen to be at one time within the same. This is not a perfect construction; for in some cases it would allow too long and in others too short a time; but *ad ea quæ frequentius accidunt jura adaptantur*; and in general this kind of offence would be committed on persons about to quit the *United Kingdom* shortly after, and it could not have been intended to exclude the case of a foreign seaman who was persuaded to leave his ship unless he came back within six months, or the case of a seaman who absconded from his ship and came back secretly and upon an information against him set up that as a defence.

As to the second objection there is some doubt whether all the formalities required by sect. 150 (4) were observed. But if the respondent was colourably bound by the agreement, the offence under sect. 257 is committed though he might have some ground for breaking the agreement.

MELLOR J. As to the first point, we must put a reasonable construction on section 525 (1), the language of which is open to considerable doubt; and that which has been suggested by my brother *Blackburn* is such. When two persons, he who solicits and he who is solicited, are both in the *United Kingdom* for six months after the offence, six months is the limit within which the proceedings must be commenced, but if during the six months either departs from the *United Kingdom*, so

that proceedings cannot be taken effectually, then the section allows a farther period of two months after the return of the absent person and both are at one time resident in the *United Kingdom*. This construction will in some cases allow more than six months of residence of both parties in the *United Kingdom*, but we cannot help that: it will best effectuate the object of the Act.

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LUSH J. There are difficulties in the way of either construction of sect. 525 (1), but on the whole the more reasonable construction is that at which we have arrived. The statute gives six months for instituting proceedings if the seaman and the person to be proceeded against remain during that time in the *United Kingdom*, but if the period of six months is broken by the fact of either going out of the *United Kingdom* the section gives two months more.

As to the other point, it would lead to the most serious consequences if a party who had induced a seaman to break his engagement could shelter himself from punishment because all the formalities required by the statute in engaging the seaman had not been complied with. The seaman himself might, if he chose, be free from his engagement, but, as against the party soliciting him to leave his ship, it is perfectly immaterial whether all those formalities have been observed.

Conviction affirmed.

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Wednesday,
January 22nd.

LAKEMAN, appellant, STEPHENSON, respondent.

7 & 8 Vict.
c. 15. s. 22.
*Accident in
factory
causing bodily
injury and
preventing
return to work.
Notice to cer-
tifying sur-
geon.*

By stat. 7 & 8 Vict. c. 15. s. 22., if any accident shall occur in a factory which shall cause bodily injury to any person employed therein of such a nature as to prevent him from returning to his work in the factory before nine o'clock the following morning, the occupier of the factory, &c., shall, within twenty-four hours of such absence, send notice to the certifying surgeon of the district. Held,

1. That a returning to the factory before 9 a.m. on the following morning without the capacity to work, and soon afterwards leaving, was not "returning to work" within the section.

2. That every accident causing bodily injury, whether connected with the machinery or not, is within the section.

CASE stated by two justices of *Lancashire* under stat. 20 & 21 Vict. c. 43.

The respondent, a cotton manufacturer, appeared before justices on an information by the appellant, one of the sub-inspectors of factories, charging that he being the occupier of a certain factory, the same being a factory within the true intent and meaning of The Factory Act, 7 & 8 Vict. c. 15., a certain accident did then and there occur in such factory which caused bodily injury to a young person named *Jane Greenwood*, of the age of fourteen years, employed therein, which was of such a nature as to prevent her from returning to her work in the factory before nine o'clock of the following morning; and that the respondent did not, nor in his absence did his principal agent, within twenty-four hours of the absence of *Jane Greenwood*, send a notice thereof in writing to the surgeon appointed to grant certificates of age for the district in which the factory was situate.

The respondent was the occupier of a cotton factory, and subject to all the provisions of stat. 7 & 8 *Vict.* c. 15. *Jane Greenwood* was employed in the factory as a weaver: she was a girl under the age of eighteen years, and so registered on the books of the factory. On the 21st *March*, 1867, at half past five p. m., she was tripped up by and fell over a rope in the factory which for a practical joke had been tied across the passage between the looms by a nephew of the respondent, who was employed by him in the factory as a responsible servant. In consequence of this fall over the rope *Jane Greenwood* was injured and sustained a severe sprain in her right wrist and arm by her having fallen against a machine in the factory, but which machine was not in motion. She did not leave the factory but remained till six o'clock in order to await the return of the respondent from *Manchester* to tell him of the accident, and did so. After the accident, and until six o'clock, she endeavoured to keep her looms running, but could not do her usual quantity of work. She returned to the factory next morning at five minutes past six o'clock, but she so returned under an arrangement with her mother that, as they were poor and could not afford the loss of wages which would be consequent on her absence, she should go and try to work as she was best able, and remain there until her mother had lighted her fire and performed her domestic duties, when she was to come and take her daughter's place and work till her recovery, and thus by this arrangement reduce the loss of wages. The girl could not raise her arm above her waist or stretch it out, and was obliged to use her knee and mouth and one hand, with a slight

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assistance from the injured hand, for the purpose of placing her cotton "cop" into the shuttle. Her mother came at twenty-five minutes past six and relieved her, and she was obliged to go home at five minutes after seven o'clock, having remained till that time in order that her mother might shew the respondent the state of her arm. She then left, and put herself under the care of a surgeon, who put her arm in splints, in which it was kept for five days. She returned to the factory after the fifth day, but contrary to the advice of her surgeon, and the bandages were not removed from her arm till after the 16th *April*.

No notice of the accident was sent to the certifying surgeon as required by stat. 7 & 8 *Vict. c. 15. s. 22.*, but the respondent contended that inasmuch as *Jane Greenwood* did actually return on the morning of the 22nd *March*, and as he saw her at her loom, no such notice of the accident was required. The appellant contended that that section required all accidents to be reported which prevented the injured person from returning to his work. Therefore the respondent ought to have sent notice of the accident to the certifying surgeon.

The justices dismissed the summons on the ground that as the girl did actually return to her work before nine o'clock of the day following the injury, no notice was required to have been sent by the respondent to the certifying surgeon. They were of opinion that it was not for them to look into the quantity or quality of the work, or whether it was done well or ill, or more or less expeditiously, or whether she continued at her work until breakfast time.

If the justices were wrong in having dismissed the summons on that ground, then they submitted to the Court whether this accident was such an accident as was intended by the section.

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It was not proved or alleged that any arrangement existed on the 21st *March* between the respondent and *Jane Greenwood* that she should return to her work before nine o'clock of the morning of the following day, nor that her return was colourable on her part to avoid the necessity for a notice to the factory surgeon.

Stat. 7 & 8 *Vict. c. 15. s. 22.* enacts, "That if any accident shall occur in a factory which shall cause any bodily injury to any person employed therein which shall have been of such a nature as to prevent the person so injured from returning to his work in the factory before nine of the clock of the following morning, the occupier of the factory, or in his absence his principal agent, shall, within twenty-four hours of such absence, send a notice thereof in writing to the surgeon appointed to grant certificates of age for the district in which the factory is situated, in which notice the place of residence of the person injured, or the place to which he may have been removed, shall be stated; and the surgeon shall send a copy of such notice to the sub-inspector of the district by the first post after the receipt thereof."

The Attorney General, Sir J. B. Karlake (*Hannen* with him), for the appellant.—First. There was no returning to work within the meaning of stat. 7 & 8 *Vict. c. 15. s. 22.* [*Lush J.* The notice is to be sent to the surgeon "within twenty-four hours of such absence."] That is, absence from *work* in the

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factory. Here the girl returned to the factory, but was unable to do her ordinary amount of work. [*Lush J.* If the factory hand is there, must the foreman know whether he is incompetent to work?] Suppose he did not do any work. [*Lush J.* It would be known whether his loom was in motion.] He might be employed in other work. [*Lush J.* Suppose, in the present case, the girl had worked on till the middle of the day. *Blackburn J.* But here she only entered an appearance for her mother.] Knowledge of the injury caused by the accident is not necessary. By sect. 41 the occupier of any factory in which any offence against the Act is committed, is deemed to have committed the offence, and is liable to the penalty. But here the respondent knew of the injury to the girl the night before; and the fact of her mother coming at 9 o'clock the next morning in her place was notice to the person who had superintendence of the workpeople.

Secondly. This was an accident within the meaning of sect. 22. By sect. 23 the certifying surgeon appointed by the inspector of the district under sect. 8 shall, after having received notice of the accident, proceed to the factory and investigate the nature and cause of the injury, and, by sect. 24, if the injury is received from the machinery of any factory the Secretary of State may empower the inspector to direct an action to be brought in the name and on behalf of the person injured. Also, sect. 59 imposes a penalty for not fencing the several parts of the machinery. It was the intention of the Legislature that the cause of every accident in a factory, causing bodily injury, should be investigated by

means of a notice to the certifying surgeon, who is to send a copy of it to the sub-inspector of the district.

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The respondent did not appear.

COCKBURN C. J. The appellant is right on both points.

First. The true meaning of sect. 22 of stat. 7 & 8 *Vict. c. 15.* is, that notice of the accident must be sent to the certifying surgeon unless the person injured not merely returns the following morning to the factory with the intention of working but is practically in a condition to work. Here the girl when she got to the factory could not work as usual ; and she went home so soon as her mother was able to come and take her place. Therefore she did not return to the factory with a capacity to work. And her master must be taken to have had full notice of the injury caused by the accident.

Secondly. The accident in the present case was not from any cause connected with the machinery. But sect. 22 is general in its terms, "that if any accident shall occur in a factory" followed by certain consequences it shall be reported to the surgeon. Therefore we are not to look to the origin of the accident.

BLACKBURN, MELLOR and LUSH JJ. concurred.

Case remitted.

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*Monday,
January 27th.*

ROSSANNA DUPIN FRAY *against* VOULES.

*Order for
suing in
formâ pau-
peris.
Costs before
service or notice
of order.*

An order for suing in formâ pauperis takes effect only from the time when it is served on the defendant or otherwise brought to his knowledge, and therefore a defendant who succeeds is entitled to his costs incurred before that time.

THIS was an action against the defendant (a), the plaintiff's attorney in an action of *Fray v. Lord Zetland*, for compromising that action without her authority.

On the trial, before *Cockburn* C. J., at the Summer Assizes at *Guildford* in 1860, a verdict was found for the defendant. In *Michaelmas* Term the plaintiff in person applied for a new trial, which was refused. In *March*, 1866, the plaintiff commenced proceedings by way of appeal, and on the 2nd *June* obtained a Judge's order admitting her to prosecute her action in formâ pauperis. The case was argued in the Exchequer Chamber on the 14th *June* and the decision of the Queen's Bench affirmed. The defendant's managing clerk when leaving the Court after judgment had been given was served by the plaintiff with a copy of the order. On the 3rd *August* the defendant taxed his costs of the proceeding in error. The plaintiff then took out a summons, calling on the defendant to shew cause why the Master's allocatur for the costs of

(a) See proceedings in this action, which were the subject of an action by the plaintiff against a Judge of this Court, 3 B. & S. 576. The point there decided has received further illustration in the recent case of *Scott v. Stansfeld*, L. R. 3 Exch. 220; 37 L. J. Exch. 155.

the proceedings in error taxed to the defendant should not be set aside. The summons was heard before *Lush J.*, who referred the matter to the Court.

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The plaintiff having obtained a rule in the same terms as the summons,

Joyce shewed cause.

The plaintiff in person supported the rule.

COCKBURN C. J. This rule must be discharged. The point is novel ; but we must see that the process of the Court is not abused, and therefore cannot allow the plaintiff to succeed in this motion. If the fact of her having obtained an order admitting her to proceed in formâ pauperis had been brought to the knowledge of the defendant he would have at once applied to the Court to set it aside, and as the whole of the proceedings of the plaintiff have been vexatious the Court would have dispaupered her. The true principle is that an order admitting a party to sue in formâ pauperis only enures from the time when it is served on the defendant, or is otherwise brought to his knowledge.

BLACKBURN J. When a plaintiff is admitted to sue in formâ pauperis he is not liable to costs except those incurred before the order, and he is not entitled to costs from the defendant incurred after the order. The question raised here is of general importance, and I think the sensible rule is that a plaintiff should not be considered as admitted to sue in formâ pauperis until the order has been served upon the defendant or he has such a knowledge of it as gives him an opportunity of applying to set it aside : it is very fair that the right under the order

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should be taken away until that time. If not, the evil is obvious: the plaintiff might keep back the order until after the cause was decided, and then, if in his favour, say he was not a pauper, and get his costs, and, if adverse to him, produce the order and avoid payment of costs.

MELLOR J. concurred.

LUSH J. I had some doubt on the point at Chambers, and as there was no case upon it I referred the matter to the Court. Having now heard the argument I think that the order admitting a plaintiff to sue in formâ pauperis should be served at once, and that it only takes effect from the time of service.

Rule discharged, with costs.

Monday,
January 27th.

WEEKS *against* WRAY.

*Common Law
 Procedure Act,
 1852, 15 & 16
 Vict. c. 76.
 s. 17.
 Order for
 proceeding
 as if personal
 service effected.
 Computation
 of time.*

Under The Common Law Procedure Act, 1852, 15 & 16 *Vict. c. 76. s. 17.*, a Judge made an order "that three days after service of a copy of this order at the defendant's residence the plaintiff shall be at liberty to proceed" as if personal service had been effected. Held, that the defendant had three clear days for entering an appearance, and that a copy of the order having been served on *Friday*, the 20th *December*, judgment signed on *Monday* the 23rd was too soon.

THIS was an application calling upon the defendant to shew cause why an order of one of the Masters of the Court, by which the judgment signed by the plaintiff in this action was set aside for irregularity, should not be rescinded.

On the 18th *December*, 1867, the plaintiff obtained a Judge's order under The Common Law Procedure Act, 1852, 15 & 16 *Vict. c. 76. s. 17.*, "that three days

after service of a copy of this order at the defendant's residence the plaintiff shall be at liberty to proceed in this action as if personal service had been effected." A copy of the order was served at the defendant's residence on *Friday* the 20th *December*, and judgment signed on *Monday* the 23rd. Afterwards, and on the same day, the defendant entered an appearance, and obtained the order setting aside the judgment on the ground that it had been signed too soon. A summons was taken out before *Lush J.* in the same terms as the present application, but he refused to make an order.

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Griffiths, in support of the application.—By Reg. Gen. *Hil. T.* 1853, 16 *Vict.*, r. 174, "In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a *Sunday*, *Christmas Day*, *Good Friday*, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also." (See 1 *E. & B. App. I.*, p. xxviii.) The order made under sect. 17 of stat. 15 & 16 *Vict. c.* 76. gives the plaintiff liberty to proceed in the action three days after the doing of an act, and therefore the days are to be reckoned exclusive of the first and inclusive of the last. [*Blackburn J.* Suppose the order was served on *Tuesday*, would the defendant have one day for entering an appearance if judgment might be signed on *Wednesday*? In *Lester v. Garland* (a) Sir *William Grant* said that there was no general rule that, where the time was

(a) 15 *Ves.* 248. 254.

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to run from the doing of an act, the day of the act done was always to be included. *Lush J.* Sections 27 and 29 of stat. 15 & 16 *Vict. c. 76.* are important to shew that the meaning of the order is that three days are given to the defendant for entering an appearance.] In *Liffin v. Pitcher (a)*, decided upon R. G. *Hil. T. 2 W. 4. VIII.* (see 3 *B. & Ad. 393*), of which the rule in question is a repetition, *Coleridge J.* held that, where ten days time to reply was given, a judgment signed for want of a replication on the eleventh day was not too soon. [*Cockburn C. J.* R. G. *Hil. T. 1853, r. 174*, may be treated as a statutory exposition of the meaning of the three days in the order, and shews that the defendant has three clear days from the service of the order for entering an appearance; the plaintiff therefore cannot sign judgment till after those days have elapsed.]

F. Brandt appeared to shew cause in the first instance.

PER CURIAM. (COCKBURN C. J., BLACKBURN, MELLOR and LUSH JJ.)

Rule refused.

(a) 1 *Dowl. N. S. 767.*

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LYNE, appellant, LEONARD, respondent.

Saturday,
January 25th.

SAME, appellant, FENNELL, respondent.

*Salmon
Fishery Act,
1865, 28 & 29
Vict. c. 121.
ss. 33. 36.
Using instru-
ment for catch-
ing salmon
without licence.*

By The Salmon Fishery Act, 1865, 28 & 29 *Vict. c. 121. s. 33.*, "licences shall be granted at fixed prices to all persons using any rod and line for fishing for salmon, and in respect of all fishing weirs, fishing mill dams, putts, putchers, nets or other instruments or devices, except rods and lines, whereby salmon are caught." Sect. 35 imposes a penalty on fishing with rod and line without a licence. Sect. 36 subjects to a penalty "any person using any fishing weir, fishing mill dam, putt, putcher, net, or other instrument or device, not being a rod and line, for catching salmon," without a licence. Held, that the using a putt, though not with the intention of catching salmon, was within sect. 36; and though the putt had at its mouth an iron grating which prevented salmon from getting in, but which could be removed at any minute.

CASES stated by justices under stat. 20 & 21 *Vict. c. 43. s. 2.*

LYNE, appellant, LEONARD, respondent.

At a Petty Session holden at *Newport*, in the county of *Monmouth*, an information under stat. 28 & 29 *Vict. c. 121. s. 36.* was preferred by the appellant, Secretary to the *Usk and Ebbw* Board of Fishery Conservators, against the respondent, who occupied a fishery at *Undy*, in that county, charging that he, after the time appointed by the conservators, did use seventy fishing putts for catching salmon, without any licence for the same.

The respondent had seventy putts laid down in his fishery with circles at all times in them to prevent salmon passing into them, and he alleged that the putts were placed there for the purpose of catching shrimps and flat fish only, and therefore that it was not necessary for him to take out any licence for putts. It was argued on the part of the appellant that the putts are fixed engines for catching salmon, and are so declared to be

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by The Salmon Fishery Act, 1861, 24 & 25 *Vict. c.* 109.

s. 4., and that it was not necessary to prove the purpose for which they were put down.

The justices were of opinion that it was necessary for the appellant to prove that the putts were laid down for the purpose of taking salmon, and that it was not sufficient, in order to bring the respondent within the penal clause under which he was charged, to prove only the naked fact that the putts were in the fishery; and they declined to convict on the ground that there was no evidence before them that the putts were there for the purpose of taking salmon or that salmon had been caught in them.

The question for the opinion of the Court was, whether the bare fact of the putts being placed in the fishery was sufficient on which to convict the respondent of using them for catching salmon without a proper licence.

LYNE, appellant, FENNELL, respondent.

This was a similar information, and was dismissed by the justices on the same ground. The only difference between the facts of this case and *Lyne*, appt., *Leonard*, respt., was that the putts laid down by the respondent in his fishery were without circles in them or stop nets over them, the nearest putt being within about fifty yards from his putchers, and that salmon ran in in a good run of tide; but the respondent denied that the putts were there for the purpose of catching salmon, alleging that they were there for the purpose of catching coarse fish and shrimps in a place where salmon did not usually run, and were not in the same position as engines were generally placed in for catching salmon.

The Salmon Fishery Act, 1865, 28 & 29 *Vict. c.* 121.

Sect. 33. "In any fishery district subject to the control of a board of conservators licences shall be granted at fixed prices to all persons using any rod and line for fishing for salmon, and in respect of all fishing weirs, fishing mill dams, putts, putchers, nets or other instruments or devices, except rods and lines, whereby salmon are caught; and the produce of such licences shall be applied in defraying the expenses of carrying into effect in such district the Salmon Fishery Acts, 1861 and 1865."

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Sect. 36. "From and after a time to be appointed as aforesaid in a fishing district, any persons using within that district any fishing weir, fishing mill dam, putt, putcher, net, or other instrument or device, not being a rod and line, for catching salmon, without having a proper licence for the same, shall be liable to a penalty of not less than double the amount to be paid for the requisite licence, and not exceeding twenty pounds."

Manisty, for the appellant.—Stat. 28 & 29 *Vict. c. 121*. s. 33. provides for granting licences at fixed prices to persons using among other things putts and putchers, or other instruments or devices, "whereby salmon are caught." Sect. 34 lays down rules with respect to those licences. And the object of sect. 36 was to prevent the use of these instruments by persons not having a licence. The phrase in that section, "for catching salmon," means the same as the phrase in sect. 33, "whereby salmon are caught." Putts and putchers are mentioned in sect. 4 of The Salmon Fishery Act, 1861, 24 & 25 *Vict. c. 109.*, by which "fixed engine" includes "all fixed implements or engines for catching or for facilitating the catching of fish." It makes

1868.	no difference that in the first of these cases the putts
LYNE	had circles at all times in them to prevent salmon from
V.	passing into them ; a circle is a circular grating of wire
LEONARD.	or basket work at the mouth of the putt, and may be
LYNE	readily removed by pulling a string attached to it. The
V.	preamble to stat. 18 G. 3. c. 33. mentions "Putt fisheries"
FENNELL.	in the river <i>Severn</i> , "in which putts," it is said, "at some particular places, are fixed an inside wheel or diddle, whereby great quantities of the spawn or fry of fish are taken and destroyed when they go down into the salt water." By stat. 24 & 25 <i>Vict. c. 109. s. 11.</i> no fixed engine "shall be placed or used for catching salmon in any inland or tidal waters" unless by virtue of a grant, charter or immemorial usage ; but even if it were a mode of fishing lawfully exercised at the time of the passing of that Act it could not, since stat. 28 & 29 <i>Vict. c. 101.</i> , be placed or used without a licence.

The respondent did not appear in either of the cases.

BLACKBURN J. The justices were wrong in both the cases before us. The object of stat. 28 & 29 *Vict. c. 121.* in requiring licences to be granted to persons using devices for catching salmon was to raise a revenue to be applied in defraying the expenses of carrying the Salmon Fishery Acts into effect—the persons who benefited by the increased number of salmon were to pay for it. By sect. 33 licences are to be granted to persons "using any rod and line for fishing for salmon, and in respect of all fishing weirs, fishing mill dams, putts, putchers, nets or other instruments or devices, except rods and lines, whereby salmon are caught." The meaning of that is that a licence shall be granted for using one of those

devices by which salmon *may be caught*, not for the purpose of catching or trying to catch salmon. A boy fishing with a rod and line and a crooked pin at the end of it would not be within sect. 35. But a person who uses a putt, which is one of the instruments or devices by which salmon are caught, benefits by the Salmon Fishery Acts, and therefore is to pay for a licence to use it. The language in the sections with respect to licences is nearly the same. By sect. 36 a penalty not exceeding 20*l.* is imposed on persons using any instrument or device not being a rod and line, which is provided for in sect. 35, for catching salmon without a licence. The justices thought that it was necessary that the person should *intend* to catch salmon. I think the clear inference from a person putting down such an instrument or device in the run of the salmon would be that he intended to catch them, but the enactment is independent of the intention in using the instrument or device. In the first case there is this difference, that a wire grating was placed at the mouth of the putt, and so long as it remained salmon could not get in; but it might in a minute be removed. A fishing weir might indeed be so permanently blocked up as to cease to be such; so also a putt might be closed up. But it does not cease to be a putt because it is temporarily stopped; a bottle is not the less such when corked.

MELLOR J. The placing a putt with an alteration or addition, unless so fixed in it as not to be removable, is within sect. 36.

LUSH J. The justices put a mistaken construction on sect. 36. The words in that section by themselves

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 LYNE
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1868.	might be construed to mean any person using an instru-
LYNE	ment for the purpose of catching salmon ; but, construing
v.	it with sect. 33, the words apply to using an instrument
LEONARD.	adapted for catching salmon whether used for that
LYNE	purpose or not.
v.	
FENNELL.	

Cases remitted.

*Saturday,
January 25th.*

MERIVALE, appellant, The Trustees of the
EXETER Turnpike Roads, respondents.

*General
Turnpike Act,
3 G. 4. c. 126.
s. 113.
Obligation to
keep open
ditches, &c., by
the side of
roads.*

1. Under stat. 3 G. 4. c. 126. s. 113. the obligation to make, scour, cleanse and keep open the ditches, drains and watercourses for keeping turnpike roads dry and conveying the water from them is on the trustees, and not on the occupiers of adjoining lands.

2. The trustees of a turnpike road in making a new line of road under the powers of a local Act cut through the appellant's land, and thereby formed a high slope or bank on one side of the road. The foot of the slope or bank was stone fenced, and watercourses formed by the sides of the road by the trustees; the fence was repaired by them for four or five years, but not subsequently. The water flowing over the slope from the adjoining lands caused slips of the earth, whereby the watercourse was filled up, and a portion of the road obstructed. Held, that there was no obligation on the appellant under stat. 3 G. 4. c. 126. s. 113. to cleanse, scour and keep open the watercourse.

CASE stated by justices under stat. 20 & 21 *Vict. c. 4.*
s. 2.

At a Petty Sessions held at *Exeter*, in *July*, 1867, the appellant was convicted upon an information preferred by the respondents, under the General Turnpike Act, 3 G. 4. c. 126. s. 113., that she, being the owner and occupier of certain lands next to and adjoining that portion of the *Exeter* turnpike road, in the parish of *St. David*, in the county of the city of *Exeter*, known as the *Cowley Bridge Road*, and having received due notice from the trustees of the roads to cleanse, scour and keep open the ditch, drains and watercourses of such portion of the road as adjoined her lands, of a sufficient width

and depth to carry off the water therefrom without obstruction and keep the same road dry, had failed so to do, contrary to the statute.

By stat. 7 G. 4. c. xxv., which had expired, but the trusts of which were continued under a new Act, power was given to the trustees of the *Exeter* turnpike roads by sects. 1. 38. to make, widen and form a new road from *Cowley Bridge* to the *Exeter* turnpike road near *Stoke Bridge*, in the parish of *Stoke Cannon*, in the county of *Devon*, through and over any private lands, grounds and hereditaments comprised in the schedule or maps and books of reference. By sect. 40 the trustees were prohibited from making the new road through two pieces of land named, without the consent in writing of the owners and occupiers of the same for the time being.

At the time of passing that Act those pieces of land belonged to *John Merivale*, through whom the appellant derived her title, and by indentures dated the 9th and 10th *April*, 1830, he conveyed them to the trustees, with full power and authority to cut, form and construct slopes, banks or fences for the intended road out of and upon the adjoining ground and soil on both sides of the intended road.

The new line of road was, shortly after the passing of the Act, duly widened and formed; and in forming and widening it through the lands of *John Merivale* a wood was cut through whereby a high slope or bank of from thirty to eighty feet high was formed on one side for some little distance. The foot of this high bank or slope was stone fenced by the trustees, in the manner termed "stone ditching," to about four or five feet high. This fencing and a small portion of the stone

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ditching nearest thereto were some years after removed by *Merivale*, and a wall and fence put up by him. The stone ditching was repaired by the trustees some four or five years after it was put up, but had never been repaired by them since. Watercourses were duly formed by the trustees by the sides of the turnpike road.

Until the present time no objection to the mode of forming the new line of road and the slopes was made.

The lands adjoining the banks or slopes, which consisted of loose shale or shillet, were not drained nor was any provision made for carrying off the water falling thereon and preventing the same from running over the slopes. From the water flowing over the slope and the action of the frost thereon the earth was lifted, and occasional slips had taken place (where the stone ditching or fencing was put up), and the earth had been carried not only into the water tables but into and over the road itself. These slips had been hitherto removed by the owner or occupier of the lands. During the past wet season another large slip, but not so large as one of the previous ones, had taken place where the original stone ditching remained, whereby not only the watercourse by the side of the road had been filled up and the water was unable to pass away, but a portion of the turnpike road itself had been covered and obstructed by the earth and rubbish.

It was contended for the respondents that it was the duty of the appellant under stat. 3 G. 4. c. 126. s. 113. to prevent the water from her lands flowing over the slopes into the road, and to open, cleanse and scour the watercourses by the side of the road to allow the water to pass without obstruction, and to remove the rubbish and earth which had fallen; that, no objection having

been made by *John Merivale*, from whom the appellant claimed, to the mode of the formation of the slopes, and the fences and walls having been since put up by him for a short distance at the bank or slope in question in substitution of those put up by the trustees, the slopes and fences must be deemed to have been adopted by him ; that the slopes and stone ditching constituted such a fence or hedge as was provided for by sect. 66 of stat. 4 G. 4. c. 95., the repair and maintenance whereof after the expiration of five years from the making devolved on the owner or occupier of the adjoining lands ; that the owners and occupiers had thus by their own acts admitted their liability to maintain the bank or slope, and to remove any slips therefrom.

It was contended for the appellant that the lands adjoining the banks or slopes did not from the nature of the soil require draining, and that she was not called upon to protect the slopes from rain water falling on them ; that the present slip of a large mass of earth and rubbish, not only into the watercourse but over it into the road itself, produced a state of things not contemplated by the 113th section of stat. 3 G. 4. c. 126. ; that *John Merivale* was not called upon to object to the manner in which the slopes were formed, that being, so far as the road was concerned, a matter entirely for the trustees, and that therefore no acceptance of them could be implied from his not interfering with their construction ; that the slopes could not be considered in the nature of a " fence or hedge " within the meaning of the 66th section of stat. 4 G. 4. c. 95., that section referring only to fences or hedges to be made or built by the trustees for the protection of adjoining lands

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from trespass, in return for which protection the adjoining occupier was called on (after a certain time) to repair them; whilst in the present instance the slopes and stone ditching, even if they could be considered as a fence "made or built" by the trustees, were put up to protect the road, and no liability to repair them was by this section or could with any fairness be thrown on the appellant.

The justices were of opinion that the appellant was not exempt from the ordinary liability to remove any obstruction occasioned to the water tables and drains by reason of the slip from the slopes, but was liable and ought to have cleansed and kept open the same.

The question for the opinion of the Court was, whether she was so liable.

Stat. 8 G. 4. c. 126. s. 113. enacts, "That ditches, drains, or watercourses of a sufficient depth and breadth, for the keeping all turnpike roads dry, and conveying the water from the same, shall be made, scoured, cleansed, and kept open, and sufficient trunks, tunnels, plats, or bridges, shall be made and laid where any carriage-ways or footways lead out of the said turnpike roads into the lands or grounds adjoining thereto, by the occupier or occupiers of such lands or grounds; and every person or persons who shall occupy any lands or grounds adjoining to or lying near such turnpike road through which the water hath used to pass from the said turnpike road, shall and is and are hereby required, from time to time as often as occasion shall be, to open, cleanse, and scour the ditches, watercourses, and drains for such water to pass without obstruction; and that every person making default in any of the

matters or things aforesaid, after ten days' notice to him, her, or them given, shall for every such offence forfeit any sum not exceeding 5l."

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The Court called upon

Coleridge (*Raymond* with him), for the appellants.—
Sect. 113 of stat. 3 G. 4. c. 126. is to be read divisim. The first part relates to the making of ditches, drains and watercourses to carry off the water from the road: this is for the benefit of the road, and therefore the duty of making them is upon the trustees. The second part relates to the making of trunks, tunnels, plats and bridges, where carriage or footways lead out of the road into the adjoining lands: this is for the benefit of the occupiers of those lands, and therefore these are to be made by them. The third part relates to the opening, cleansing and scouring of ditches, watercourses and drains in lands adjoining or lying near the road through which water has been used to pass from it, and the duty of doing that is on the occupiers of those lands. It would be a strong thing to say that where a road passed through a cutting and the drains were filled up by a landslip, or by the earth carried down by a storm, the burden of remaking and cleansing the drains, which was not a common law duty on the occupiers of the adjoining lands, should be imposed on them by statute.

Hayes Serjt. (*Lopes* with him), for the respondents.—
Sect. 113 of stat. 3 G. 4. c. 126. does not state by whom the ditches, drains and watercourses for conveying the

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water from the road are to be made, scoured, cleansed and kept open; but that doubt is cleared up by stat. 4 G. 4. c. 95. s. 66., which enacts that when a new road is made through private grounds the trustees shall keep the fences in good order and repair for five years from the time they were made. After the expiration of that term, as the ditch is incident to the hedge and serves the purpose of protecting it, though it also carries off the water from the road, the liability to maintain it is on the owner of the adjoining land.

BLACKBURN J. The justices were wrong in convicting the appellant. The question depends on the construction of sect. 113 of stat. 3 G. 4. c. 126., and light is thrown upon it by sect. 115 of the same Act, and by sects. 66 and 67 of stat. 4 G. 4. c. 95., which are in *pari materiâ*.

When a road is formed it is desirable for the sake of the road that means should be provided for carrying away the water from it, and generally this is done by making and keeping open on the side of it a channel in which the water flows until it comes to some point where it is carried off by an outlet into the adjoining land. The Legislature in sect. 113 of stat. 3 G. 4. c. 126. make a distinction between ditches, drains and watercourses for keeping the road dry and conveying the water from it and the other works mentioned in that section. It begins by enacting that the former shall be made, scoured, cleansed and kept open: pausing there, the section does not say by whom; but this being one of the purposes of the Act the duty would properly fall upon the trustees of the roads

who are appointed to carry out those purposes. Before closely examining the section and considering the language I thought that the words in the next clause, "by the occupier or occupiers of *such* lands," overrode the whole sentence, and that the ditches, drains and watercourses were to be made, scoured, cleansed and kept open by the occupiers of the adjoining lands. But that is not the grammatical sense, because "such lands" in that clause are lands into which there is a private carriage or footway out of the turnpike road across a ditch, drain or watercourse. The section is not neatly drawn; it is however made intelligible by putting in the word "that," and then the clause would run thus, "and that sufficient trunks, &c., shall be made and laid where any carriageways or footways lead out of the said turnpike roads into the lands or grounds adjoining thereto, and that is to be done by the occupier of those lands or grounds." This is shewn to be the intention of the Legislature by sect. 115, which enacts that where any gutter, drain, &c., made under or at the sides of the road, shall be used as well for the conveyance of water from the road as for conveying water, filth or other matters from houses, and no specific mode of repair or persons liable to the expense of maintaining the same, shall be appointed, the expense of maintaining and repairing the gutter, drain, &c., shall be borne and defrayed equally or in proportions, not by the occupier of the adjoining land, but by the trustees of the turnpike road and the inhabitants of the town using the same. Therefore the Legislature assumed that the ditch or drain on the side of the road belonged to the trustees, and should be maintained by them. The last part of the 113th section makes a dis-

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inction between ditches, drains and watercourses on the side of the road, and those by which water passes from the road through adjoining lands; the occupier of the land through which the water hath used to pass from the road is to keep open, cleanse and scour the latter. In the present case the water is running by the side of the road, and the appellant does not occupy any land through which the water hath used to pass from it.

Also stat. 4 *G. 4. c. 95. s. 66.* makes a great distinction between a ditch on the side of a road for the purpose of draining it, and a ditch which is a necessary part of a fence: it enacts that where trustees alter any part of a road, or make a new road, they shall plant a quickset hedge, or make a proper fence on the side of the road, with a ditch and post and rails, or other fence, on both sides of the hedge, to protect its growth, and keep the fences so made in good order and repair for five years. At the expiration of that term so far as the ditch is part of the fence the trustees have no right to require the occupier of the adjoining land to maintain it: if he chooses to discontinue to use it as a fence there is nothing to prevent him from doing so. On the other hand, if the trustees, after the five years, choose to use a tile drain instead of the ditch for keeping the road dry, there is nothing to prevent them from doing that. Sect. 67 is a supplement to the latter part of sect. 113 of stat. 3 *G. 4. c. 126.*, and provides for cases in which water has not been used to pass away from the road through the adjoining land, and where there is no drain, by empowering the trustees to go on adjoining land and make one.

Therefore the obligation to make, scour, cleanse and

keep open this drain is imposed upon the trustees and not upon the occupier of the adjoining land. If indeed the obligation were imposed upon the owner of the adjoining land, and without qualification, he must discharge it however troublesome and though more onerous than his duty at common law.

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MELLOR J. After the judgment of my brother *Blackburn* it is not necessary for me to go elaborately through the enactments which have been referred to. The object of sect. 113 of stat. 3 G. 4. c. 126. was to keep a newly made road dry. It does not impose any fresh obligation on the occupiers of adjoining lands, but only confirms that which existed at common law. Neither does sect. 66 of stat. 4 G. 4. c. 95. assist my brother *Hayes'* construction. After the expiration of the five years it leaves the road trustees and the occupier of the adjoining lands in the same condition as before the diversion of the old road.

LUSH J. concurred.

Conviction quashed.

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*Friday,
January 31st.*

KIMBRAY against DRAPER.

*Retrospective
enactment.
County Courts
Act, 1867,
30 & 31 Vict.
c. 142. s. 10.*

The County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 10.*, by which actions for malicious prosecution and other actions of tort may be stayed or remitted for trial to a County Court unless the plaintiff give security for costs or satisfy the Judge that he has a cause of action fit to be prosecuted in the superior Court, applies to an action commenced before the passing of the Act.

THIS was an action against an attorney for negligence, and had been commenced before the 20th *August*, 1867. Upon an application to the Master under sect. 10 of stat. 30 & 31 *Vict. c. 142.*, which received the Royal assent on the 20th *August*, 1867, but by sect. 36 did not come into operation till the 1st *January*, 1868, calling upon the plaintiff to shew cause why he should not give security for costs, or in default thereof why proceedings should not be stayed or the action be remitted to the County Court, upon an affidavit that the plaintiff had no visible means of paying costs, the Master decided that sect. 10 applied to all actions whether pending at the time when the Act came into operation or commenced subsequently. Upon an appeal to *Lush J.* at Chambers from the decision of the Master, he referred the case to the Court.

The County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 10.*, enacts, "It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort may be brought in a superior Court to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant

should a verdict be not found for the plaintiff, and thereupon a Judge of the Court in which the action is brought shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the Masters of the said Court, or satisfy the Judge that he has a cause of action fit to be prosecuted in the superior Court, all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the Judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of such County Court, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys; and the County Court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said County Court should have power to try the said action, and the same had been commenced by plaint in the said County Court; and the costs of the parties in respect of the proceedings subsequent to the order of the Judge of the superior Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings in the superior Court shall be allowed according to the scale in use in such latter Court."

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Atkins now moved for a rule nisi in the same terms as the application to the Master.—Stat. 30 & 31 *Vict.* c. 142. s. 10. was passed for the purpose of preventing

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vexatious actions against respectable defendants: it does not prohibit an action which the plaintiff had a right to bring, but only requires that it shall be brought in the County Court unless security for costs is given. This enactment only regulates procedure, and therefore may have a retrospective operation. Rule nisi.

McIntyre shewed cause in the first instance.—The plaintiff had a vested right of action in the superior Court. And the language of sect. 10 of stat. 30 & 31 *Vict. c. 142.* is prospective; it applies to any action which “may be” brought, not which “may have been brought.” [*Blackburn J.* Those words are hardly so strong as “shall be;” where the statute is intended not to be retrospective the Legislature say so, as in sect. 5. But it is singular how the phrase is changed in different sections. *Cockburn C. J.* Probably half of the marvellous inconsistencies in recent Acts of Parliament are introduced by the patchwork in committees. *Mellor J.* The plaintiff has a right of action for every malicious prosecution, but no vested right to have it tried in one of the superior Courts. *Lush J.* Stat. 3 & 4 *W. 4. c. 42. s. 31.* enacts that in every action brought by an executor or administrator in right of the testator or intestate the executor or administrator shall, unless the Court or a Judge otherwise order, be liable to costs; and in *Grant v. Kemp (a)* it was held that where an action was commenced by an executor before, though not tried till after, the passing of the statute, a successful defendant was entitled to costs.] The effect of this enactment is not merely an alteration of procedure, but a stay of proceedings in the superior Court. [*Blackburn J.* It is not an absolute stay of proceedings, but a compulsion to go to the County Court unless security

(a) 2 C. & M. 636.

is given for costs. It affects the plaintiff's vested right to do a wrong to the defendant. *Mellor J.* Sect. 10 applies to actions which could not have been brought in the County Court before the statute.] [He cited *Moon v. Durden (a).*]

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Atkins, in support of the rule.—In *Wright v. Hale (b)* it was held that stat. 23 & 24 *Vict. c. 126. s. 34*, which enacts that when the plaintiff in any action for an alleged wrong recover less than 5*l.* he shall not be entitled to costs if the Judge certifies to deprive him of them, enables a Judge to certify in an action commenced before the passing of the Act, on the ground that it was an enactment merely regulating practice and not affecting a vested right. *Pollock C. B.* said, p. 231, "When an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, I think it does apply to such actions."

COCKBURN C. J. I have had doubt about the present case and about the decision in *Wright v. Hale (b)*. However, it was there held that sect. 34 of stat. 23 & 24 *Vict. c. 126.* was retrospective; and as sect. 10 of the present Act is a most salutary enactment, and the canon of construction laid down in that case applies here, we may hold that it is retrospective.

BLACKBURN J. The rule in construing statutes is, that where the effect of an enactment is to change the rights of parties it is not retrospective; but where it only changes the manner of procedure it applies to actions pending as well as future. But for the decision

(a) 2 *Exch.* 22.(b) 6 *H. & N.* 227.

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in *Wright v. Hale* (a) I should have hesitated on the question whether sect. 34 of stat. 23 & 24 *Vict. c.* 126. was not an enactment taking away a right, viz., the right which the party previously had to costs. But the rule there laid down is that a statute enabling a Judge to deprive a plaintiff of costs in a case where, but for the statute, he would be entitled to them, deals with matter of procedure only. The enactment in sect. 10 of stat. 30 & 31 *Vict. c.* 142. causes the end of the action to be in the County Court instead of the superior Court unless the plaintiff gives security for costs, which is much less the taking away a right than depriving a party of costs.

MELLOR J. I have considerable doubt whether sect. 10 is retrospective. The language of different sections in the statute is used in an indiscriminate manner. However the object of sect. 10 was to make the proceedings under the circumstances stated similar to those in the County Court; and as there are no negative words in the section we may adopt the construction given to sect. 34 of stat. 23 & 24 *Vict. c.* 126. in *Wright v. Hale* (a), and hold that sect. 10 of stat. 30 & 31 *Vict. c.* 142. is retrospective also.

LUSH J. At Chambers I had very considerable doubt on the point, and therefore referred the case to the Court. But construing sect. 10 of stat. 30 & 31 *Vict. c.* 142. with the others, and applying the canon laid down in the analogous case of *Wright v. Hale* (a), I think the section applies to actions pending at the time of the statute coming into operation.

Rule absolute; the plaintiff to give security within ten days (b).

(a) 6 *H. & N.* 227.

(b) See *Butcher v. Henderson*, post.

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ENGEL *against* FITCH and others.[Thursday,
April 16th.]

1. The rule laid down in *Flureau v. Thornhill*, 2 W. Bl. 1078,—that upon a contract for purchase of real property, if the title proves bad and the vendor is without fraud incapable of making a good one, the purchaser is not entitled to damages beyond the amount of the deposit and interest thereon and the expenses of investigating the title,—is anomalous, being founded on the state of the law as to real property; and does not apply where the non-performance of the contract arises not from a difficulty as to title but from the fact of the party who engages to sell not having secured to himself the property in or the possession of the thing of which he takes on himself to dispose.

*Vendor and purchaser.
Sale of real property.
Refusal of vendor to convey.
Damages.
Loss of profit on resale:*

2. The defendants, mortgagees with a power of sale, sold to the plaintiff by auction the lease of a house, the particulars of sale stating that possession would be given on completion of the purchase. The transaction was by the conditions of sale to be completed by the 26th December. By the 5th condition, in case the vendor should be unable or unwilling to remove or comply with any objection or requisition as to the title, he was at liberty to rescind the contract and to return the deposit money without interest, costs or other compensation. The mortgagor being in possession refused to give it up; and the plaintiff, having sold to a purchaser who bought the house for occupation, required possession before completion. Thereupon the defendants rescinded the contract on account of the expense they would incur in order to enable them to complete. Held,

- (1). That the defendants were not entitled to rescind under the 5th condition.
- (2). That the plaintiff could recover damages for the loss of profit on the resale, and the expense consequent on it.
- (3). That such damages were not too remote, according to the rule in *Hadley v. Baxendale*, 9 Exch. 341.

THIS was an action by purchaser against vendor for not performing an agreement to sell the lease of a house.

On the trial, before *Shee J.*, at the *Middlesex* Sittings during *Hilary* Term, 1867, the facts were as follows. The defendants put up to auction, subject to certain conditions of sale, the lease of two houses mortgaged to them as trustees with a power of sale, which power they had become entitled to exercise. One house was described in the particulars of sale as being let to weekly

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tenants; as to the other it was stated in the particulars that "possession would be given on the completion of the purchase." The plaintiff being the highest bidder, the lease was knocked down to him for the sum of 195*l.*, and thereupon the deposit required by the conditions was duly paid by him. The transaction was by the conditions of sale to be completed by the 26th of the ensuing *December*, 1865. The 5th article of the conditions stipulated:—"All objections or requisitions as to the title or conveyance (if any) shall be delivered in writing to Messrs. *Lewis & Sons*, 7, *Wilmington Square*, W.C., the vendor's solicitors, within seven days after the delivery of the abstract, and in default of such delivery, and as to all matters not therein specifically objected to, the title shall be considered as accepted, and every answer to any original or subsequent statement of objections or requisitions shall, within seven days after the delivery of such answer, be replied to by a statement in writing delivered as aforesaid, and any such answer not so replied to shall be considered as satisfactory and final, and in case any objection or requisition shall be so delivered, and the vendor shall be unable or unwilling to comply therewith or remove the same, the vendor is to be at liberty by notice in writing under the hand of the vendor's solicitors to rescind the contract, and on receiving back the abstract to return the deposit money without interest, costs or other compensation, notwithstanding any attempt made to satisfy, remove or comply with any such objection or requisition or any negotiation or litigation in reference thereto, or other proceeding consequent on the sale."

No difficulty arose as to the title of the defendants,

but the mortgagor, being in possession of the second house, refused to give it up, so that the defendants, though fully able to convey, were not in a situation to give possession according to the contract. The plaintiff having in the meantime resold the premises to a Mr. *Gilbert*, who had bought the house for occupation, at an advance of 100*l.*, Mr. *Richardson*, the solicitor of the latter, was put into communication with the solicitors of the defendants for inspection of the deeds. Some slight delay occurred, and a letter having been written by the defendants' solicitors, with a view to despatch, the following letter was written by the solicitor of the plaintiff:—"15 *January*, 1866. Dear Sirs. I have seen Mr. *Richardson* herein. The only reason the matter is delayed is your not being able to give possession, and as I would not on my client's behalf consent to complete without having possession given to us as stated in the conditions of sale matters would not be improved by my proceeding on their behalf to carry out the contract. What is the difficulty in ousting the tenant?"

To this letter the following answer was given:—

"*February* 1, 1866. Dear Sir. The purchaser having made an objection which the vendor is unable and unwilling to comply with, the vendors rescind the contract, and the purchaser can obtain back his deposit by application to the auctioneer, Mr. *Tebb*, at 139, *Cheapside*."

On the 9th *February* the plaintiff's solicitor wrote:—"Please specify the objection upon which the vendors affect to rescind the contract, and the grounds upon which they allege their inability to comply with it."

The answer to this letter was:—"16 *February*, 1866.

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Dear Sir. The purchaser requires possession to be delivered up. Mr. *Holdsworth*, the mortgagor, denies the right of the vendor to possession, and the vendors will have to incur considerable expense to obtain the same. The vendors have therefore rescinded the contract."

The defendants subsequently brought an ejectment and ousted the mortgagee.

The defendants having thus refused to perform the contract the plaintiff brought this action to recover not only his deposit and interest thereon and the expenses of investigating the title but also the loss of the profit on the resale, as well as the expenses which he had incurred in preparing for the sale to his vendee. The defendants paid into Court enough to cover the amount of the three first.

A verdict was entered for the plaintiff for 105*l.*, the loss of the profit on the resale as also for the expenses incurred with reference to the resale, leave being reserved to move to enter a verdict for the defendants.

In the following *Easter Term*,

Hayes Serjt. obtained a rule accordingly.

The case was argued in *Michaelmas Term*, November 4, 1867, and *Hilary Term*, January 29, 1868 ; before COCKBURN C. J., SHEE and LUSH JJ.

Field and *W. Y. Clare* shewed cause.—They contended that the rule as to damages for breach of contract in the case of sales of real estate which was recognized in *Flureau v. Thornhill* (a) and *Sikes v. Wild* (b) affirmed on appeal (c) did not apply to the present case, in which

(a) 2 *W. Bl.* 1078.

(b) 1 *B. & S.* 587.

(c) 4 *B. & S.* 241.

the sale did not go off for want of title. They cited *Hopkins v. Grazebrook* (a), *Robinson v. Harman* (b), per Parke B., *Simons v. Patchett* (c), per Lord Campbell, *Lock v. Furze, on appeal* (d), per Blackburn J.

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Hayes Serjt., in support of the rule, contended, first, that the fact of the vendor not having a right to possession, and therefore being unable to give possession to the purchaser, was an objection of the same nature as a defect of title, within the rule in *Flureau v. Thornhill* (e), *Sikes v. Wild* (f), affirmed on appeal (g). He cited *Bratt v. Ellis* and *Jones v. Dyke*, *Sugd. Vend. and Purch. App.* v. and vi., 14th ed, *Walker v. Moore* (h), per Bayley and Parke JJ., as contrary to *Hopkins v. Grazebrook* (a), *Tyrer v. King* (i), *Pounsett v. Fuller* (j), per Williams J.

Secondly, that, if the plaintiff was entitled to damages beyond the expense of investigating the title, the damages for the loss of his bargain on a resale were too remote. He cited *Hadley v. Baxendale* (k).

Cur. adv. vult.

COCKBURN C. J. now delivered the judgment of the Court. This case was argued before the late Mr. Justice Shee, my brother Lush and myself; but in consequence of the illness and death of that learned Judge, whose loss we in common with the whole profession most sincerely lament however admirably the vacancy is filled by his

(a) 6 B. & C. 31.

(c) 7 E. & B. 568. 572.

(e) 2 W. Bl. 1078.

(g) 4 B. & S. 421.

(i) 2 C. & K. 149.

(b) 1 Exch. 850. 855.

(d) H. & R. 379. 384-5.

(f) 1 B. & S. 587.

(h) 10 B. & C. 416. 420-1. 422-3.

(j) 17 C. B. 660. 681-2.

(k) 9 Exch. 341. 354-5.

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successor, it was rendered impossible to submit to him the judgment for his consideration ; and it must therefore be taken as the judgment of my brother *Lush* and myself.

After stating the facts as ante, pp. 85-8. The question before us is, whether the plaintiff is entitled to recover the profit he would have made on the resale if the defendants had completed the contract, as also the expenses of preparing for the sale to the second vendee.

On the argument before us in support of this claim the general law on the subject of damages for breach of contract was relied on, the facts of the present case, as it was contended, not bringing it within the rule laid down in *Flureau v. Thornhill* (a) and the cases which have followed it, but rather within the exception engrafted on that rule by the decisions in *Hopkins v. Grazebrook* (b) and *Robinson v. Harman* (c).

On the part of the defendants it was contended. First, that by the objection made by the purchaser to complete on account of the inability of the vendors to give possession the defendants were warranted in giving notice to rescind the contract under the 5th article of the conditions, and having done so were protected from all liability beyond that of returning the deposit money. Secondly, that on the failure to complete a contract for the sale of real estate on account of expense which the vendor finds he would have to incur in order to enable himself to complete the sale, no loss of profit or expense consequent on a resale can be recovered by the vendee. Thirdly, that such damages are too remote according to the rule established in *Hadley v. Baxendale* (d).

The first of these grounds is easily disposed of. The

(a) 2 *W. Bl.* 1078.(b) 6 *B. & C.* 31.(c) 1 *Exch.* 850.(d) 9 *Exch.* 341.

5th article of the conditions of sale has reference expressly to title and the instrument of conveyance alone. Such a condition is obviously introduced for the purpose of protecting a vendor against difficulties as to title which in the complicated state of the law of real property often unexpectedly arise, and which a vendor is not always able to remove, at least without considerable expense. Here no question arose as to the title or as to the form of the conveyance; the purchaser simply declined to complete till the party in possession should have been ousted so that possession could be given according to the contract. The vendors were not in our opinion, under such circumstances, entitled to rescind under the 5th article of the conditions.

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The other grounds taken by the defendants present more difficulty, and as they involve questions of importance as regards the law of vendors and purchasers we thought it right to give them our deliberate consideration.

In support of the second ground, the case of *Flureau v. Thornhill* (a) and the cases which have followed it were relied on, and we have to see whether the present case properly falls within the principle of those decisions.

It will be necessary to observe what were the facts in *Flureau v. Thornhill*. There the defendant, having sold to the plaintiff a rent issuing out of a leasehold house and finding himself unable to make out the title, offered the plaintiff either to take the title with all its faults or to receive back the deposit with interest and costs. The plaintiff refused to take the title, and brought an action to recover not only the deposit with interest

(a) 2 W. Bl. 1078.

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and costs but also damages for the loss of his bargain. The defendant having paid into Court enough to cover everything but the damages for the loss of the bargain, it was held that the plaintiff was not entitled to recover in respect of the latter.

When the facts of the present case are looked at they will be found to differ from the foregoing in material particulars. The obstacle to the completion of the contract had no reference to title. It was one which the vendors were not unable, but which on account of the expense they were unwilling, to remove. They might, had they chosen to incur the expense, have ousted the mortgagor by ejectment, as they in fact did after they had put an end to the present contract. Lastly, it was not the purchaser, but the sellers, who repudiated the contract. All that the purchaser said on being urged to hasten the completion was that he could not complete till the sellers were in a position to give possession. The letter of the plaintiff's solicitor of the 15th *January*, with its concluding question, "What is the difficulty in ousting the tenant?" appears to us to shew not only that the plaintiff did not repudiate the contract, which indeed having resold at a profit it was his interest to get completed, but that he was willing to afford time for the necessary steps being taken to obtain possession of the property. The refusal to complete was the act of the sellers, who chose to break their contract rather than undergo an expense which would have enabled them to perform it though it might have made it an unprofitable one to them.

It is no doubt true that the defendants could not have ousted the mortgagor by ejectment by the 26th *December*, the time fixed by the conditions of sale for

completing the transaction but so long as the purchaser was willing to waive the question as to time the sellers, more especially as the stipulation was one made in their favour, could not take advantage of a delay occasioned by their own default. Furthermore the stipulation as to time had in fact been waived, for the correspondence which terminated in the defendants rescinding the contract all took place after the 26th *December*. We must take it therefore that the contract was wilfully broken by the defendants without lawful excuse; and the question is, whether the rule established by *Flureau v. Thornhill* (a) or by any of the cases decided on its authority is applicable to the present. We think it is not.

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The question mainly turns on whether the rule referred to is an exceptional one, and therefore only applicable to the special circumstances with reference to which it was laid down, or one which from any peculiarity in the nature of contracts relating to the transfer of real property ought, in the absence of fraud, to be extended to all contracts of this description.

Now, however firmly settled the law as laid down in *Flureau v. Thornhill* (a) may be, it must be admitted that that case itself is anything but satisfactory. The question came before the Court for the first time, yet no reasons for the decision are given by the Judges. An earlier case indeed from *Palmer's Reports* termed *Brigs's Case* (b) is referred to in the books as a case in point. But when that case, which was an application for a prohibition to the Court of the Marches in *Wales* is referred to all that appears is that the plaintiff having paid a fine as the consideration for a lease and the

(a) 2 *W. Bl.* 1078.(b) *Palm.* 364.

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intended lessor having been evicted before the lease was made, whereupon the plaintiff brought his suit in the Court of the Marches, it was said by the Court of King's Bench on the subject of damages that an action on the case would lie for the loss of the benefit of the bargain, in which the plaintiff would recover not only what he had paid for a fine but also damages for breach of the contract, but that an action of debt would not lie because the plaintiff had not given his money with a view of having it returned. But as to what was the extent or the limit of the damage which the plaintiff might recover for the loss of his bargain nothing was said, though the term damages "for the loss of the benefit of the bargain" would rather seem to imply more than the fine paid and the expenses incurred by the disappointed party. The point having thus come before the Court for the first time in *Flureau v. Thornhill* it is certainly unsatisfactory to find that in the absence of precedent or authority the Court assign no principle for a decision which must be admitted to have been an exceptional departure from the general rule as to damages for breach of contract. "I think," says *De Grey C. J.*, "the verdict wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost." *Gould J.* was of the same opinion. *Blackstone J.* was of the same opinion, and added, "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit with interest and costs is all that can be

expected." *Nares* J. at first hesitated, but next morning declared that he concurred with the other Judges.

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It certainly would have been more satisfactory if, in a case laying down so important and at the same time exceptional a rule, the Judges had given the reasons of their decision as a guide in future cases. We are left in doubt whether the decision proceeded on an established practice of conveyancers and solicitors, or as has been suggested on the ground that in the complicated state of the law of real property the owner of an estate is often unable to make out such a title as a purchaser will be bound to take, and the parties therefore are only placed on fair terms if on the purchaser rejecting the title the liability of the seller shall be limited to the repayment of the deposit and the expenses of investigating the title. In *Walker v. Moore* (a) *Littledale* J. says, p. 422, "When a contract for the purchase of lands is made, each party cannot but know that the title may prove defective, and must be taken to proceed upon that knowledge." And *Parke* J. says, p. 423, "In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain." These dicta however throw no light on the question whether the understanding referred to is to be implied from the rule laid down, or the rule has been based on an understanding already established in practice.

The decision in *Flureau v. Thornhill* (b) is further open to exception in this, that it introduces a qualifica-

(a) 10 B. & C. 416.

(b) 2 W. Bl. 1078.

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tion into the rule that it shall only be applied in the absence of fraud. The inconsistency of this qualification with the general rule, according to which motives are inadmissible in estimating damages for breach of contract, has been fully pointed out by Mr. *Sedgwick* in his most able work on *Damages*, 4th ed., pp. 227, 234-5. And in the recent case of *Sikes v. Wild*, on appeal (a), *Erle* C. J. appears to speak doubtingly of the position that "actual fraud is necessary to take away the protection."

It is therefore not altogether to be wondered at that Lord *Tenterden* should have expressed himself not satisfied of the soundness of this decision. In *Hopkins v. Grazebrook* (b) he says, p. 33, "Upon the present occasion I will only say, that if it is advanced as a general proposition, that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point, I should desire to have time for consideration."

The precedent of *Flureau v. Thornhill* (c) was however followed in the succeeding cases of *Bratt v. Ellis* and *Jones v. Dyke*, reported in the Appendix to *Sugden on Vendors and Purchasers*, 14th ed., Nos. v. and vi., pp. 812-813. The latter of these cases was a *Nisi prius* decision, but the former was a decision of the Court of Common Pleas in banc; neither of them is however found in the regular Reports, and though cited on the argument in *Hopkins v. Grazebrook* (b), they do not appear to have been deemed conclusive by Lord *Tenterden*. But in the subsequent case of *Walker v. Moore* (d) this Court upheld the rule, and refused to allow to the

(a) 4 B. & S. 421. 424.

(c) 2 W. Bl. 1078.

(b) 6 B. & C. 31.

(d) 10 B. & C. 416.

plaintiff, who having agreed for the purchase of an estate had before comparing the title deeds with the abstract resold a portion but afterwards found that the title was defective, either the loss of profits on the resale, or the expenses of the resale, or the sums he was liable to pay to parties with whom he had contracted. Besides being recognized as law in the subsequent case of *Robinson v. Harman* (a) the rule was upheld by the Court of Common Pleas in the case of *Worthington v. Warrington* (b), by the Court of Queen's Bench in *Ireland* in the case of *Buckley v. Dawson* (c), and by this Court and the Court of Exchequer Chamber in the recent case of *Sikes v. Wild* (d), and has even been extended to a new class of cases by the Court of Common Pleas in the case of *Pounsett v. Fuller* (e). In canvassing therefore the decision in *Flureau v. Thornhill* (f), upheld as it has been by all these authorities, we must not be considered as intending to dispute the law as settled by that case. Our purpose is to consider whether the rule laid down is exceptional and confined to breach of contract from inability to make out a sufficient title, or is applicable to breach of contract in respect of the sale of real property from whatsoever cause arising.

In two well known cases the rule was treated as exceptional and as limited as above stated. In *Hopkins v. Grazebrook* (g) where the defendant, having contracted for the purchase of real estate, but not having obtained a conveyance, had resold to the plaintiff but failed to complete his contract by reason of his vendor being

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(a) 1 *Exch.* 850.(b) 8 *C. B.* 134.(c) 4 *Br. C. L. R.* 211.(d) 1 *B. & S.* 587; affirmed on appeal, 4 *B. & S.* 421.(e) 17 *C. B.* 660.(f) 2 *W. Bl.* 1078.(g) 6 *B. & C.* 31.

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unable to convey to him, this Court, holding the circumstances to be materially different from those in *Flureau v. Thornhill* (a), refused to apply the rule of the latter case, and held the defendant liable not only in respect of the expenses which the plaintiff had incurred but also in respect of the loss sustained by the latter in not having the contract carried into effect. Lord *Tenterden*, distinguishing the case from *Flureau v. Thornhill*, observes, p. 33, "There the vendor was the owner of the estate, and an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase money with interest; here no such offer was or could be made. The defendant had, unfortunately, put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer *some* title, and having entered into a contract to sell without the power to confer even the shadow of a title, I think he must be responsible for the damage sustained by a breach of his contract." And *Bayley J.* says, p. 34, "The case of *Flureau v. Thornhill* is very different from this, for here the vendor had nothing but an equitable title. Now where a vendor holds out an estate as his own, the purchaser may presume that he has had a satisfactory title, and if he holds out as his own, that which is not so, I think he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted."

The case of *Hopkins v. Grazebrook* (b) has it is true been more than once questioned by high authority as inconsistent with the decision in *Flureau v. Thornhill*; but, with the utmost deference for the opinions referred

(a) 2 W. Bl. 1078.

(b) 6 B. & C. 31.

to, if the case of *Hopkins v. Grazebrook* (a) is considered on its true grounds it appears plainly distinguishable from *Flureau v. Thornhill* (b) and stands upon a perfectly intelligible and sound foundation.

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There is an obvious difference between the case of a man who, being in possession and the undoubted owner of real property, is unable to make out a marketable title, and that of one who, not being the owner, but having only a contract for the purchase of real estate, takes upon himself to sell it to another as his own and as if the title were his to convey. The difficulty of making out title which exists in the one case, and forms the foundation of the rule and the justification of the exceptional departure from ordinary principles, is wholly wanting in the other. It is upon this distinction, as it appears to us, that the Court of King's Bench proceeded in *Hopkins v. Grazebrook* (a). It is true that in criticizing that case it has been said that the decision proceeded on the ground of the misconduct of the defendant. This assertion, which appears to have been founded on an unguarded expression of Bayley J. in *Walker v. Moore* (c) where, distinguishing that case from *Hopkins v. Grazebrook* (a), he says, p. 420, that in the latter case the Court were of opinion that the defendant had been "in fault by representing himself as the owner of the property," seems to us altogether inaccurate. There is no suggestion in the language of Lord Tenterden or of Bayley J. himself of any "misconduct" in the defendant. It merely comes to this, that a man who undertakes to sell what he has not secured the command of has only himself to blame, and is not protected by a

(a) 6 B. & C. 31.

(b) 2 W. Bl. 1078.

(c) 10 B. & C. 416.

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rule which has reference solely to difficulty in making out title. The matter is put on its true footing by Parke B. in *Robinson v. Harman* (a), where, precisely the same point having arisen, the Court, without hesitation, adopted the principle of *Hopkins v. Grazebrook* (b). He there says, p. 855, "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The case of *Flureau v. Thornhill* (c) qualified that rule of the common law. It was there held, that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law, and I am unable to distinguish it from *Hopkins v. Grazebrook* (b)."

Viewed by the light of what is said by Lord *Wensleydale* and Baron *Alderson* in *Robinson v. Harman* (a), as also upon general principles, the whole matter seems capable of being put on a clear and intelligible footing. By the law of *England*, as a general rule, a vendor who, from whatever cause, fails to perform his contract, is bound, as was said by Lord *Wensleydale* in the case referred to, to place the purchaser, so far as money will do it, in the position he would have been in if the contract had been performed. If a man sells a cargo of goods not yet come to hand, but which he believes to have been consigned to him from abroad, and the goods fail

(a) 1 *Exch.* 850.(b) 6 *B. & C.* 31.(c) 2 *W. Bl.* 1078.

to arrive, it will be no answer to the intended purchaser to say that a third party, who had engaged to consign the goods to the seller, has deceived or disappointed him. The purchaser will be entitled to the difference between the contract and the market price. There is nothing in the nature of real property which either on technical or general grounds should take a contract for the sale of real estate out of this general rule, with one single exception, namely, that owing to the state of the law as to real property the undoubted owner of an estate often finds unexpected difficulty in making out a title which he cannot overcome. If, an obligation to make out title being implied in every such contract, the opposite party rejects the title and repudiates the contract, it seems not altogether unreasonable that he shall be entitled to no more than the return of the deposit, if any, and the expense of investigating the title. In this exceptional case he is put, not in the condition in which he would have been if the contract had been performed, but in the condition in which he would have been if the contract had not been made. He is where he was before without the estate and the benefit it would have brought him if a title could have been made to it. But the limit of the exception is to be found in the reason on which it is based; the reason ceasing the rule should also cease. It can properly have no application where the non-performance of the contract arises not from a difficulty as to title but from the fact of the party who engages to sell not having first secured to himself the property in the thing of which he takes on himself to dispose. In such case there seems no sound reason why the consequences which arise on a breach of contract in the sale of goods should

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not equally attach. Far from seeing any grounds, either in law or reason for extending the rule there appear to us to be good grounds for the contrary. In our view, notwithstanding what is said by *Erle* C. J. in *Sikes v. Wild* (a), the rule is an anomalous one, that is to say, it is a departure from general principles and inconsistent with ordinary rules of law based upon and applicable to a special and exceptional state of things alone. There is, therefore, no reason in a legal point of view for extending it, while on the other hand there seems good reason for not encouraging men to affect to sell property the power to dispose of which they have not secured, and thereby to entail inconvenience and possible loss on the purchasers without, at least, bringing to the knowledge of the latter the real position in which they stand.

The cases of *Hopkins v. Grazebrook* (b) and *Robinson v. Harman* (c) have, it is true, been materially entrenched upon by the judgment of the Court of Common Pleas in the case of *Pounsett v. Fuller* (d) and that of this Court and the Court of Exchequer Chamber in *Sikes v. Wild* (e). In the first of these cases it was held that where a party had sold the shooting of a manor, having merely an equitable title but having a fair reason to believe that he had a right to sell, he was not liable beyond the expense of examining the title and nominal damages. In *Sikes v. Wild* real estate had been left to the defendants in trust to sell, but by a marriage settlement the land was vested in trustees to secure an annuity to the widow of the devisor. The defendants, or rather their solicitor who was acting for them, was

(a) 4 B. & S. 421. 423.

(b) 6 B. & C. 31.

(c) 1 Exch. 850.

(d) 17 C. B. 660.

(e) 1 B. & S. 587; affirmed on appeal, 4 B. & S. 421.

aware that a title free from incumbrance could not be made without the assent of the widow and her trustees, but the solicitor had obtained a verbal promise from the widow that in the event of the sale she would consent to have her security transferred to another property, and (as found by the jury) he believed and had reasonable grounds for believing that he would be able to make a good title free from incumbrance. After the sale however the widow refused to assent. This Court, and afterwards the Court of Exchequer Chamber on appeal, with the approbation of Lord *St. Leonards* (a), whose opinion on the subject is we need not say of the greatest weight, held that the liability of the defendants was limited to the deposit and the expense of investigating the title, and that the plaintiff was not entitled to recover anything for the loss of his bargain.

These decisions have not only given effect to the rule as originally laid down but have no doubt further extended it in a most important particular. In each of the earlier cases, the defendant, being in possession and having the legal estate, had only failed to complete the contract by reason of his inability to make out such a title as the purchaser was bound to take. It seemed just that if the latter thought fit to refuse to accept the title the seller should be liable to no more than the restitution of the deposit and the expense of investigating the title. But the possession of an equitable title and the reasonable belief of obtaining the legal estate so as to satisfy the exigency of the contract were not deemed sufficient to relieve the seller from ulterior damages. In *Hopkins v. Grazebrook* (b) *Bayley J.* distinguished

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(a) *Vend. & Purch.* 14th ed., 360, 361.

(b) 6 B. & C. 31. 34.

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the case from *Flureau v. Thornhill* (a) on the express ground that the defendant had nothing but an equitable title. In *Robinson v. Harman* (b) the defendant had in like manner an equitable title, but not being in a condition to convey the legal estate was held liable in damages.

So far as the cases of *Pounsett v. Fuller* (c) and *Sikes v. Wild* (d) may be considered to have enlarged the rule in *Flureau v. Thornhill* and narrowed the decision in *Hopkins v. Grazebrook* and *Robinson v. Harman*, we are no doubt bound by them : but they have not gone the length of expressly overruling these cases, and, believing them to have been rightly decided and to be based on sound principles, we are not disposed to entrench upon them further than we are compelled.

Of course the observations we have made as to the rule in *Flureau v. Thornhill* (a) apply with equal if not with greater force to a case where a contract is broken not in respect of inability to transfer property but to deliver possession. We can see no reason for giving immunity to a vendor who engages to sell an estate and deliver possession without first securing the possession which he then undertakes to deliver. A fortiori, according to our opinion, the rule in *Flureau v. Thornhill* can have no application where the failure either to make out a title or to give possession arises not from the inability of the vendor but from his unwillingness either to remedy a defect in the title or to obtain possession on the score of expense. In such case he ought not to be in a better position than a vendor who, having con-

(a) 2 *W. Bl.* 1078.(b) 1 *Exch.* 850.(c) 17 *C. B.* 660.(d) 1 *B. & S.* 587; affirmed on appeal, 4 *B. & S.* 421.

tracted to sell and deliver goods by a certain day, declines to fulfil because an increase in the cost of procuring them has made his contract a losing one. In our judgment therefore the contention of the defendants that the rule in *Flureau v. Thornhill* is applicable to such a case as the present fails; if it is to be extended to embrace such a case it must be by the decision of a Court of appellate jurisdiction.

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The last point taken on the part of the defendants was, that the damages sought to be recovered were too remote when tested by the rule established in *Hadley v. Baxendale* (a). We think that this objection also fails. The purchase of real property sold by auction for the purpose of resale is matter of everyday occurrence, and the possibility of a resale cannot be taken to be beyond the contemplation of the parties to such a contract. In all the cases on this subject which have come before the Courts this objection if well founded would have been a conclusive answer to the claim for damages, but in none of them was it taken. In *Hopkins v. Grazebrook* (b) and in *Robinson v. Harman* (c) it would have afforded a complete defence, but in both those cases damages were allowed. Considering those cases as authority, so far as they have not been qualified by the decisions in the recent cases, we consider them as authorities for holding that damages for the loss arising from a breach of contract on the sale of real estate may properly be allowed in an action on such a breach. The rule to enter the verdict for the defendants must therefore be discharged.

Rule discharged.

(a) 9 *Exch.* 341.(b) 6 *B. & C.* 31.(c) 1 *Exch.* 850.

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Friday,
January 23rd.

Highway.
5 & 6 W. 4.
c. 50. s. 95.
Indictment.
Certiorari.
Costs.

The QUEEN against The Inhabitants of the Township of IPSTONES.

1. An indictment against a township for non-repair of a highway directed by justices of the peace under stat. 5 & 6 W. 4. c. 50. s. 95. (the subsequent stat. 25 & 26 Vict. c. 61. not having been adopted in the district), was removed into the Queen's Bench by certiorari obtained by the defendants. The case was tried at the Assizes and the defendants acquitted. Held, overruling *Reg. v. The Inhabitants of Eardisland*, 3 E. & B. 960, that the Judge by whom the case was tried could not under that section award costs to the prosecutor.

2. *Quære*, whether, where an indictment under that section is not removed by certiorari, the Judge can refuse to allow where the party prosecuting is himself the wrongdoer, as being bound *ratione tenuræ* to repair the highway?

PROCEEDINGS were taken before justices of the peace under the General Highway Act, 5 & 6 W. 4. c. 50., for the non-repair of a highway, whereupon they directed an indictment against the inhabitants of the township of *Ipstones* under sect. 95 of that Act. The defendants pleaded that the prosecutor was bound to repair the highway *ratione tenuræ*.

The indictment having been removed into this Court by certiorari obtained by the defendants it was sent down for trial, and tried before *Mellor J.* at the Summer Assizes for *Staffordshire* 1867, when the jury found a verdict for the defendants. The Judge refused to direct the costs of the prosecution to be paid out of the rates for the township, and a subsequent application for the same purpose having been made to him at Chambers he referred the parties to the Court. The question depended altogether on the Highway Act, 5 & 6 W. 4. c. 50., as the more recent Highway Act, 25 & 26 Vict. c. 61., was not adopted in the county of *Stafford* where the township was situate.

Huddleston moved for a rule accordingly.—Stat. 5 & 6 W. 4. c. 50. s. 95. enacts that “If on the hearing of any such summons respecting the repair of any highway the duty or obligation of such repair is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices and they are hereby required to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed, at the next Assizes &c., or at the next General Quarter Sessions of the Peace &c., against the inhabitants of the parish or the party to be named in such order for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be directed by the Judge of Assize before whom the said indictment is tried, or by the justices at such Quarter Sessions, to be paid out of the rate made and levied in pursuance of this Act in the parish in which such highway shall be situate: Provided nevertheless, that it shall be lawful for the party against whom such indictment shall be so preferred at the Quarter Sessions as aforesaid to remove such indictment by certiorari or otherwise into his Majesty’s Court of King’s Bench.” This section renders it *imperative* on the Judge of Assize or the justices at Quarter Sessions before whom the case is tried to make an order allowing the prosecutor his costs under the circumstances; *Reg. v. The Inhabitants of Yarkhill* (a), *Reg. v. The Inhabitants of Great Broughton* (b), *Reg. v. The Inhabitants of Heanor* (c), *Reg. v. The Justices of Surrey* (d), *Reg. v. The Inhabitants of Eardis-*

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(a) 9 C. & P. 218.

(b) 2 M. & Rob. 444.

(c) 2 M. & Rob. 445, note.

(d) 1 B. C. C. 70; 21 L. J. M. C. 195; 16 Jur. 641.

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land (a). The latter case is expressly in point, the only difference being that the certiorari there was obtained by the prosecutor, and the verdict was in his favour; and *Reg. v. The Inhabitants of Haslemere (b)*, shews that the Judge of Assize may award a prosecutor his costs though the defendant pleads guilty. Where a highway is out of repair the public good requires that the evil be remedied without delay. [*Cockburn C. J.* Does the Act apply where the man who puts the law in motion turns out to be the wrongdoer himself? *Blackburn J.* By the new Act 25 & 26 *Vict. c. 61. s. 19.* the awarding costs is put on a more just footing, but that statute does not extend to this case.]

The Court granted a rule nisi.

Staveley Hill shewed cause in the first instance.—Sect. 95 of stat. 5 & 6 *W. 4. c. 50.* is not applicable where an indictment has been removed into this Court by certiorari before trial; and the case is governed by stat. 5 *W. & M. c. 11. s. 8.*, which enacts, “If the defendant prosecuting such writ of certiorari be convicted of the offence for which he was indicted, then the said Court of King’s Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, &c., or overseer of the poor, or any other civil officer, who shall prosecute upon the account of any fact committed or done, that concerned him or them, as officer or officers, to prosecute or present, which costs shall be taxed according to the course of the said Court, and that the prosecutor for the recovery of such costs shall within ten days after demand made of the defendant, and refusal of payment on oath, have an attach-

(a) 3 *E. & B.* 960.

(b) 3 *B. & S.* 313.

ment granted against the defendant by the said Court for such his contempt; and that the recognizance shall not be discharged till the costs so taxed shall be paid." In no case has it been held imperative on the Judge under sect. 95 to allow the prosecutor his costs when the cause has been removed by the defendant and the verdict found in his favour. If this were so the 98th section would be superfluous, which enacts, "It shall and may be lawful for the Court before whom any indictment shall be preferred for not repairing highways to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said Court that the defence made to such indictment was frivolous or vexatious." *Reg. v. The Inhabitants of Yarkhill* (a) was tried on the Crown side at the Assizes, as appears by the report.

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Huddleston (*Griffits* with him), in support of the rule, relied on *Reg. v. The Inhabitants of Heanor* (b) and *Reg. v. The Inhabitants of Preston* (c), in the latter of which it was held that costs may be given under sect. 98 although the proceedings have been removed by certiorari. [*Blackburn J.* The point about certiorari was not raised in the former case.]

COCKBURN C. J. This rule must be discharged. Under stat. 5 & 6 *W.* 4. c. 50. s. 95. the Judge of Assize by whom the case is tried is to direct payment of the costs to be made out of the highway rate. The intention

(a) 9 *C. & P.* 218.

(b) 2 *M. & Rob.* 445, note. See the report of the same case in banc, 6 *Q. B.* 745, from which it appears that the decision of *Tindal C. J.*, by whom it was tried, was come to without information as to previous rulings.

(c) 7 *Dowl.* 593.

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of the Legislature was that, where complaint was made and the justices of the peace saw that the road was not repaired, they should make an order for an indictment, that whoever was directed to prosecute should be indemnified as to costs, and, with a view to the maintenance of highways, which it is so important to keep in repair, that he should not be liable to them even if defeated. But the Legislature did not interfere with the right of the defendants charged with non-repair to plead that they were exempt from it, or that others were liable *ratione tenuræ*, nor did they take away the right of the party charged to remove the case into this Court by *certiorari*. This indictment has been so removed, and the moment that is done incidents attach which do not apply to indictments in the usual course of the criminal law. The Judge tries the case at *Nisi prius* as the representative of the superior Court, *i. e.*, he is no longer sitting as Judge of Assize in the ordinary sense of the term. When the indictment is thus removed the defendants enter into recognizances and find sureties to pay costs if defeated. It may be and probably was the case, that those who framed this provision had not present to their mind what would be the consequences when the indictment was removed by *certiorari*. I cannot think that the Legislature meant that the prosecutor was to have his costs if the indictment was tried by a Judge at *Nisi prius*, or of Oyer and Terminer, and not if it was tried on the other side of the Hall by a Judge sitting as representing the superior Court. Yet if the Legislature has failed to make provision to meet such a case we cannot remedy the defect. When I read sect. 95 I am satisfied what must have been the intention of the Legislature, namely, that where a road indictment is tried in the ordinary course the prosecutor is to have his costs. But

this does not apply to an indictment removed into the Court above. Moreover, the only order that can be made as to costs under sect. 95 is that they shall be paid out of the rates, but when the indictment is removed this important difference arises, that every inhabitant is liable to pay them. Therefore the machinery of the statute does not apply.

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I am quite aware that this decision must be taken as overruling *Reg. v. The Inhabitants of Eardisland (a)*. But it is to be observed that though this point was taken there it was taken very shortly, and was summarily dismissed by the Court without considering what were the legal merits, and under a misapprehension of the real effect of what they were doing. We are not influenced by the circumstance that when an indictment is removed by the defendant the Legislature has omitted to provide, as they certainly ought to have done, against the power to grant costs to the prosecutor being abused in instances like the present, where the prosecutor, being himself to blame, has endeavoured to cast them on another party.

BLACKBURN J. In trying this indictment my brother *Mellor* was acting for this Court. Stat. 5 & 6 W. 4. c. 50. is applicable, seeing that stat. 25 & 26 Vict. c. 61. was not adopted in the district where this road is situate. In sect. 95 of the former Act the Legislature clearly mean that the justices of the peace are to determine if the highway is out of repair, and then make a summary order for its repair unless the liability to repair is denied. Having ascertained that the highway is out of repair the Legislature say, "it shall then be lawful for such justices *and they are hereby required*"

(a) 3 E. & B. 960.

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(that clause is imperative) “to direct a bill of indictment to be preferred, &c., against the inhabitants of the parish or the party to be named in such order &c. ; and the costs of such prosecution shall be directed by the Judge of Assize before whom the said indictment is tried, or by the justices at such Quarter Sessions, to be paid out of the rate.” Now I think if the Legislature had contemplated such a case as where the justices of the peace, when directing an indictment to be preferred, make the prosecutor the very person who ultimately turns out to be in the wrong, they would have provided for it. As it is there may be a difficulty in saying that they have left any discretion to the Judge of Assize. But that question does not arise here. The Act does not say what is to be done when the indictment is removed into the Queen’s Bench and tried before a Judge acting as Judge of that Court. In such a case the costs are not provided for, which is either a casus omissus or because the Legislature thought them sufficiently provided for by stat. 5 *W. & M. c. 11.*, sect. 3 of which enacts “if the defendant prosecuting such writ of certiorari be convicted of the offence &c., that then the said Court of King’s Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, &c., or any other civil officer, who shall prosecute upon the account of any fact committed or done, that concerned him or them, as officer or officers, to prosecute or present.” So that in such case, where the defendant is convicted and the prosecutor is a civil officer, an expression which would apply to a surveyor of highways, the Act gives costs. The Legislature may well have thought that if the case was of sufficient importance

to be removed into the Queen's Bench, the defendant makes himself liable to costs which he ought to pay, and therefore in stat. 5 & 6 *W. 4. c. 50. s. 95.* they say, we will leave such cases untouched, and keep to those disposed of at Quarter Sessions or by the Judge of Assize. Thence it would follow that when the indictment was removed and the defendant acquitted the prosecutor would not get costs. I do not know if the Legislature meant that, but at all events they have not ordered the Queen's Bench to direct costs to be paid out of the highway rate in such a case.

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This decision is contrary to the case of *Reg. v. The Inhabitants of Eardisland (a)*. There however the point was not very clearly brought before the Court. If the case could have been taken into error I should have thought myself bound by it. But that is not so, and this one point is quite enough to justify us in discharging this rule.

MELLOR J. I should have considered myself bound by *Reg. v. The Inhabitants of Eardisland* if I was satisfied that the Court had deliberately considered the point before us and refused to interfere with the Judge's order; but in that case there appears to have been some misapprehension, and the rule was very summarily refused on that point. Now, considering sect. 95 of stat. 5 & 6 *W. 4. c. 50.*, I agree with the Lord Chief Justice that it refers to ordinary indictments before a Judge of oyer and terminer, who is the final Judge respecting costs, and can order payment of them out of the highway rate, and that the Legislature did not contemplate the removal of an indictment into the Queen's Bench by

(a) 3 *E. & B.* 960.

1868. certiorari. When an indictment is sent down by the
 The QUEEN Queen's Bench to be tried by the Judge sitting at
 v. Nisi prius he is acting for this Court. I can find no
 Inhabitants of words in sect. 95 directing that the costs shall be paid
 IPSTONES. in such a case; to hold that there are, would be strain-
 ing the words of the section.

LUSH J. The case of *Reg. v. The Inhabitants of Eardisland* (a) is not satisfactory, for the particular point before us was not clearly brought before the Court, and as there could be no appeal we can place our own construction on stat. 5 & 6 W. 4. c. 50. s. 95. Does the expression "Judge of Assize" in that section comprehend the Judge sitting on the civil side of the Court, or does it apply exclusively to the Judge sitting in a criminal Court under a commission of oyer and terminer? Two reasons induce me to take the latter, which is the ordinary sense of the word: First. The proviso giving or rather preserving the power to remove the indictment into the Queen's Bench by certiorari, and no provision being made as to costs in such a case, which indicates that the statute leaves the costs to be determined by the Certiorari Act, 5 W. & M. c. 11. Second. If we were to construe "Judge of Assize" to mean both the Judges sitting at the Assizes it would create a distinction between counties which cannot have been intended by the Legislature. Suppose an indictment removed by certiorari were tried in the county of *Middlesex* or any other where there are no Assizes, it would not be tried with the same result as to costs as if it were tried elsewhere.

Rule discharged.

(a) 3 E. & B. 960.

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In re SHERRY.

*Monday,
January 20th.*

A., being in his fifteenth year, entered into the service of *C.* as *salaried* clerk in *March*, 1855, "and was continuously employed by him in the transaction and performance of various matters of business" until *March*, 1864, when he was articled for five years. Held, that he was entitled to be admitted as an attorney in *Easter* Term, 1868, under stat. 23 & 24 *Vict. c. 127. s. 4.*, which enacts that any person who has served as clerk to an attorney for ten years, and has afterwards served under articles of clerkship for three years, may be so admitted.

23 & 24 *Vict. c. 127. s. 4.*
Attorney.
Admission of
articled clerk.

HENRY *Sacheverel Sherry*, an articled clerk, presented himself for examination in this Term, with the view of being admitted in the next, under stat. 23 & 24 *Vict. c. 127. s. 12.*, which enacts that when the period for which a clerk is articled expires in Vacation the examination may take place in the Term immediately preceding.

From the affidavit of the applicant and the answers of himself and his principal it appeared that in *March*, 1855, the applicant, being then in his fifteenth year, entered into the service of *Mr. James Wickins*, an attorney, as a *salaried* clerk, in which he still remained, and was continuously employed by him in the transaction and performance of various matters of business. The business was a very extensive one, consisting chiefly of conveyancing, chancery and common law practice, in all of which he was during that period actively engaged, and at the time of the present application had the management of the business under his superintendence. The affidavit proceeded thus:—"In my capacity of clerk to *Mr. James Wickins* I have become personally acquainted with many of his clients, and many of them, on being

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informed of his retirement from practice, have promised to place their business in my hands to act for them as their attorney. If I am not admitted as an attorney next *Easter* Term I shall suffer great loss and detriment in my profession, inasmuch as I shall be unable to practice and so accept the business which has been offered to me as aforesaid, in addition to which, owing to the retirement of Mr. *Wickins*, I shall be compelled to incur the expense of procuring an assignment of my articles to some other attorney."

On the 22nd *March*, 1864, the applicant (having overlooked the provision in sect. 4 of the Act whereby persons who have been *bonâ fide* clerks for ten years may be admitted after three years service) entered into articles of clerkship for five years with Mr. *Wickins*, which would expire by effluxion of time in *March*, 1869.

The Examiners, considering these answers insufficient, refused to examine the candidate.

Anderson moved for a rule calling on them to do so.— There was no legitimate reason for rejecting this clerk. It is true he was very young when he entered the service, but it is not alleged that he acted as *managing* clerk. A lad of fourteen can transact a good deal of business under the direction and superintendence of his principal, and much younger are often seen at chambers. Stat. 23 & 24 *Vict. c. 127. s. 4.* enacts, " Any person who, either before or after the passing of this Act, shall for the term of ten years have been a *bonâ fide* clerk to an attorney, solicitor, &c., and during that term shall have been *bonâ fide* engaged in the transaction and performance, under the direction and superintendence of such attorney, solicitor,

&c., of such matters of business as are usually transacted and performed by attorneys, solicitors, &c., and who shall produce to the Examiners satisfactory evidence that he has faithfully, honestly, and diligently served as such clerk, and who after the expiration of the said term of ten years has been bound by and has duly served under articles of clerkship to a practising attorney, solicitor, &c., for the term of three years, and has been examined and sworn &c., may be admitted and enrolled as an attorney and solicitor, &c.; and where any such person has, before the passing of this Act, been bound for five years, he may, after having duly served three years of such term in such manner as would have been required if he had been bound for three years only, and having been examined and sworn as aforesaid, and with the consent in writing &c., of the attorney, solicitor, &c., to whom he may be bound, to the immediate determination of his articles of clerkship, be admitted and enrolled as an attorney or solicitor." The facts here disclosed fully comply with the intention of the Legislature. [*Blackburn J.* You must shew ten years of such service as that section requires.] [He was then stopped.]

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Murray, on the part of the Examiners, shewed cause in the first instance.—It may be conceded that this case is a hard one, but these answers have not satisfied the Examiners that there was a bonâ fide service during the requisite time. It is impossible that a lad of fourteen could have transacted the business of an attorney. [*Cockburn C. J.* If he was in the office as an errand boy or messenger I quite admit this would not be sufficient. But if he was actually doing such business as he could,

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why should he be in a worse position?] The term of ten years required by stat. 23 & 24 *Vict. c. 127. s. 4.* should be fully completed before the clerk is bound by articles. Similar language is used in sect. 2, by which a person who has taken a degree in one of the Universities and “has been bound by and has duly served under articles of clerkship to a practising attorney or solicitor for the term of three years, and has been examined and sworn &c., may be admitted and enrolled as an attorney or solicitor.” [*Blackburn J.* The words in sect. 4 are capable of either meaning, but why must the execution of articles be after the lapse of the ten years? What harm would follow from the opposite construction?] The intention of the Legislature was to dispense with two years service if the examination shewed that the powers of the applicant’s mind were equal to the duties of an attorney. Under the former enactment, 6 & 7 *Vict. c. 73. s. 7.*, which contains similar language, it was held by this Court that the applicant must have taken his degree at one of the Universities before he was bound by articles (*a*). [*Blackburn J.* The words of that Act are different. The Legislature there say, if the party “shall within four years after the day whereon he shall have taken or shall take such degree be bound by contract in writing to serve as a clerk for and during the term of three years, &c.”]

Anderson stated that the parties were ready to give further information if required.

COCKBURN C. J. It will not be necessary. The Examiners considered it impossible that a lad so young

(*a*) See *Ex parte Bradford*, 1 *E. & E.* 417.

as the applicant was when he entered on the ten years service could do the business of an attorney's office, but as it appears he served more than three years under articles after the ten expired, that becomes immaterial. What can it signify whether a person serves nine years without and four under articles, or ten without and three under them?

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BLACKBURN J. It is unreasonable to say that the applicant was so young that it was *impossible* for him to have done what is here stated.

MELLOR and LUSH JJ. concurred.

Rule absolute.

BAILEY and others *against* BOWEN.

Friday,
January 17th.

[Reported 8 *B. & S.* 734.]

DIGNAM *against* BAILY.

Friday,
January 17th.

[Reported 8 *B. & S.* 744.]

ROLLE, appellant, WYTE, respondent.

Thursday,
January 30th.

[Reported 8 *B. & S.* 116.]

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REGULA
GENERALIS.

REGULA GENERALIS (*a*).*Jan. 23rd, Hilary Term, 31 Vict.*

IT IS ORDERED that, on motions founded on affidavits made on the Crown side of this Court after the present Term, it shall be lawful for either party, with leave of the Court or a Judge, to make affidavits in answer to the affidavits of the opposite party upon any new matter arising out of such affidavits.

A. E. COCKBURN.

COLIN BLACKBURN.

JNO. MELLOR.

WILLM. SHEE.

ROBT. LUSH.

(*a*) See The Common Law Procedure Act, 1854, 17 & 18 Vict.
c. 125. s. 45.

END OF HILARY TERM.

HILARY VACATION, 31 VICT.

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EMANUEL *against* ROBARTS and others.Tuesday,
February 11th.

1. It is a custom of bankers in the city of *London* not to pay a cheque marked "post dated." Held, that this custom is part of the contract between a *London* banker and his customers, and therefore a customer could not maintain an action against his banker for refusing payment of a cheque so marked.

*Post dated
cheque payable
to order.
Custom of
London ban-
kers.*

2. A post dated cheque payable *to order* is not illegal.

THIS was an appeal against the decision of the deputy Judge of the *Marylebone* County Court of *Middlesex*.

The action was brought by the plaintiff, an attorney and solicitor having offices in the city of *London*, against the defendants, bankers, carrying on business in the city of *London*, to recover damages on account of the defendants having dishonoured a cheque drawn by the plaintiff on the defendants' bank and payable to *Montague Jacobs* or order, and presented to the defendants for payment, the plaintiff having at the time sufficient assets in the defendants' bank to meet the cheque.

The plaintiff had a banking account at the defendants' bank on the usual terms. The cheque so dishonoured was in form and in words and figures following :

" 15, *Lombard Street*. " *London*, 14 Nov., 1866.

" 4132

" Messrs. *Robarts, Lubbock & Compy*.

" Pay to *Montague Jacobs* or order one thousand pounds sterling.

" £1000.

" *Joel Emanuel*."

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The stamp on the cheque was for 1*d.* The cheque, although bearing date the 14th *November*, 1866, was presented to the defendants for payment on the 13th *November*; the defendants refused to pay it, and wrote on the face thereof the words "Post dated." The cheque was again presented to the defendants for payment on the 14th *November*, and the defendants still refused to pay it notwithstanding they then had sufficient moneys of the plaintiff in their hands.

The defendants contended that they were justified in not paying the cheque on the 14th *November*, on account of its having been post dated and having been so marked by them, and also on account of its bearing a stamp duty of only one penny. They proved a custom of bankers in the city of *London* not to pay at any time cheques so long as the same were marked "Post dated."

The plaintiff replied that the custom was bad in law, and that the cheque, although post dated, was a legal order for the payment of money and that the stamp thereon was sufficient.

The Judge gave a verdict for the defendants.

The question for the opinion of this Court was, whether the defendants were legally justified in refusing to honour the cheque when presented to them for payment on the 14th *November*, 1866.

Hayes Serjt., and *Oppenheim* who continued the argument absente *Hayes* Serjt., for the plaintiff.—First. This instrument being payable *to order* was not rendered void or illegal by being post dated, as it is not within the provisions of stats. 55 *G.* 3. c. 184. and 21 & 22 *Vict.* c. 20. By stat. 55 *G.* 3. c. 184., Schedule, Part 1, an *ad valorem* duty is charged upon inland bills of exchange,

drafts or orders to the bearer or to order, either on demand or otherwise ; but there is an exemption of " all drafts or orders for the payment of any sum of money *to the bearer on demand*, and drawn upon any banker" &c. Sect. 13, which was aimed at frauds and evasions of the duties under colour of the exemption, imposes a penalty on the issuing, receiving, or paying " any bill, draft or order, for the payment of money to the bearer on demand, upon any banker &c." which shall be dated on any day subsequent to that on which it was issued. Therefore a post dated cheque was void ; but to make the instrument a cheque so as to bring it within the exemption from duty it must be an order payable to the bearer on demand. [*Blackburn J.* Therefore this instrument, being payable to order, is not within the exemption.] Stat. 21 & 22 Vict. c. 20. imposes a stamp duty of 1*d.* on " all drafts or orders for the payment of any sum of money *to the bearer on demand.*" And by sect. 2, all the powers, provisions, and regulations, pains and penalties contained in or imposed by any Act relating to duties are to be in force and to be applied with respect to the duty granted by that Act, so that the provisions of sect. 13 of stat. 55 G. 3. c. 184. as to post dated cheques may be held to be in force. But as both these Acts apply only to drafts *payable to the bearer on demand*, it follows that a draft payable to order is not an invalid or void instrument under stat. 55 G. 3. c. 184. Until stat. 16 & 17 Vict. c. 59. this instrument would have required a bill stamp, but by sect. 1 of that statute and the schedule the reduced duty of 1*d.* instead of the former is imposed on a " draft or order for the payment of any sum of money *to the bearer or to order, on demand.*" Therefore this cheque

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 EMANUEL cheque is for all practical purposes a bill of exchange.
 v. [They cited *Whistler v. Forster* (a), *Austin v. Bun-*
 ROBERTS. *yard* (b), *Forster v. Mackreth* (c), per *Kelly C. B.*]

Secondly. The custom relied on is bad, as being unreasonable, for the effect of it is to restrict the circulation of negotiable instruments contrary to the law merchant.

Day, for the defendants.—First. This is a draft or order payable otherwise than on demand within stat. 55 *G.* 3. c. 184., by sect. 11 of which, if any person shall make or issue, or accept or pay, any draft or order liable to any of the duties imposed by that Act, not being duly stamped, he shall forfeit the sum of 50*l.* But if it be not, this action is not maintainable, being upon a contract between a customer and his bankers that they would honour his cheques drawn according to the custom of bankers in the city of *London*.

Secondly. The case finds that “the plaintiff had a banking account at the defendants’ bank on the usual terms.” He was therefore bound by the custom; and whether it is reasonable or not is immaterial.

Hayes Serjt., in reply, was called upon to support the first ground of objection.—A banker is bound by law to pay a legal cheque drawn by a customer if he has in his hands sufficient funds belonging to the customer; *Marzetti v. Williams* (d). [*Mellor J.* This is perhaps not properly a custom, but a general prac-

(a) 14 *C. B. N. S.* 248.

(b) 6 *B. & S.* 687.

(c) 36 *L. J. Exch.* 94. 96; *L. R.* 2 *Exch.* 163. 167.

(d) 1 *B. & Ad.* 415.

tice like that of not paying crossed cheques except through a banker. *Lush J.* Or like the practice of closing at 4 o'clock in the afternoon and on *Saturday* at 3 p.m. Bankers in the city of *London* have a clearing house for all cheques, and recently bankers in provincial towns have sent their cheques to *London* to be passed through that clearing house; this practice gives the drawer of a cheque so sent one day more for paying it. *Blackburn J.* If a person makes an instrument false on the face of it there is nothing unreasonable in bankers having a custom not to pay it.] In *Byles on Bills*, p. 26, 9th ed., it is said that stat. 16 & 17 *Vict. c. 59. s. 19.* introduced a new description of drafts on bankers; and the custom among the bankers of the city of *London* as to cheques does not apply to post dated cheques payable *to order*, for they are not unlawful instruments; *Watson v. Poulson (a)*. [*Blackburn J.* The Judge of the County Court must have meant that the custom applied to a cheque of this description which is throughout the case called a cheque.]

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BLACKBURN J. There must be judgment for the defendants on the ground that the decision of the Judge of the County Court was right as to the custom. The duty and obligation which a banker owes to his customer to pay cheques drawn by him arises from the contract between them, when the customer puts his money into the bank, that the banker will honour his cheques provided he has funds and the cheques are legal; *Marzetti v. Williams (b)*. And when a contract is made not in a public but in a private place, which *Lloyd's* has been established to be by the Exchequer Chamber

(a) 15 *Jur.* 1111.(b) 1 *B. & Ad.* 415.

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in *Sweeting v. Pearce* (a), and a local law or custom affecting the contract exists there, that is a tacit part of the contract. The finding here is that in the city of *London* there is a custom among bankers not to pay cheques which are marked post dated. Therefore it is found as a fact that there is a custom among bankers in the city of *London* not to honour cheques of customers payable to bearer or to order when they purport to be payable on demand. When a cheque so payable is presented they give their reason for not paying it by marking it as "post dated." Here a cheque payable to order was so marked, and therefore when it was presented the second time the bank was aware of the original defect. This custom puts a restriction on the duty and obligation of a banker in the city of *London*, and makes the contract between him and his customers to be a contract to pay their cheques provided they are not post dated and the fact of their being so is not brought to his knowledge. The defendants have not broken that contract. It has taken us some time to discover that this instrument is not illegal, which shews that there is nothing unreasonable in a banker saying that his clerks shall not undertake to determine for him whether a post dated cheque is legal or not, and therefore that they shall not pay it.

On the other point the appellant is right. By stat. 55 G. 3. c. 184., Schedule, Part 1, a uniform ad valorem stamp was imposed on every "inland bill of exchange, draft or order to the bearer, or to order, either on demand or otherwise," unless the time of its currency exceeded two months after date, subject to the exemption of "drafts or orders for the payment of any sum of money to the bearer on demand, and

(a) 9 C. B. N. S. 534.

drawn upon any banker or bankers," who resided or transacted business within ten miles of the place where the drafts or orders were issued; provided they bore date on or before the day on which they were issued. And it being thought that the documents on which the stamp had been imposed might be post dated, by which the revenue would be wronged, sect. 12 enacted that any person making or issuing a bill of exchange, &c., which should bear date subsequent to the day on which it was issued, so that the time of its currency should exceed the number of days for which the particular stamp was imposed, should be subject to a penalty of 100*l*. Then sect. 13, for the purpose of preventing evasions of the duties on bills of exchange, &c. under colour of the exemption in favour of drafts or orders upon bankers, imposes the same heavy penalty on persons making and issuing any bill, draft or order for the payment of money *to the bearer on demand*, upon any banker &c., which shall not in every respect fall within the exemption; but orders for the payment of money *to order* are carefully excluded. Stat. 16 & 17 *Vict. c.* 59. reduced the duty on drafts or orders for the payment of any sum of money to the bearer or to order, if payable on demand, to 1*d*., however large the sum for which they were drawn; drafts or orders payable otherwise than on demand remain as before. There is the possibility of the revenue being wronged by an instrument such as this being post dated, but that did not occur to the framers of the recent statute and they do not provide for it. It requires some positive enactment to *meet* that evasion; for it is not illegal at common law *to evade* a stamp duty. And, attention having been drawn to the omission, a clause will probably be introduced into the next Stamp Act.

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MELLOR J. The Judge of the County Court has found the existence of the custom in question, which is not unreasonable, and is so well established that the customers of bankers in the city of *London* may be supposed to deal on that footing. It seems the wisest plan that bankers should not determine the question whether a cheque is illegal or not, but, if doubtful, refuse to pay it. And the Judge of the County Court must have been satisfied that not only cheques properly so called, but drafts payable to order, were subject to the custom.

As to the other point, Mr. *Day* failed to point out any enactment which renders post dated cheques payable *to order* illegal, and my brother *Blackburn* has gone through all those bearing on the question.

LUSH J. I am of opinion that the defendants were justified in refusing to pay the cheque, not because it was illegal, but because of the custom among bankers in the city of *London* not to pay cheques which are known to them to be post dated. That custom being part of the bargain between the bankers and their customers, and the opening of their account with him being on those terms, a customer cannot maintain an action against them for refusing to pay a post dated cheque. Nor is it relevant to inquire whether the custom is reasonable. I think however it is a perfectly reasonable part of the bargain, and binding on both parties.

On the other point I am satisfied that there is no section in any Act of Parliament which imposes a penalty or renders it illegal either to draw or to pay a post dated cheque payable *to order*.

Judgment for the defendants.

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The Mayor, Aldermen, and Burgesses of the
Borough of REIGATE *against* HART.

Wednesday,
February 12th.

A parliamentary borough was by charter constituted a municipal borough, with the powers and privileges belonging to those named in Schedule (B.) to stat. 5 & 6 W. 4. c. 76. It had no grant of a separate Court of Quarter Sessions; and the justices of the county, by virtue of sect. 111, exercised the jurisdiction of justices of the peace in and for the borough concurrently with the mayor, who by sect. 57 is *ex officio* a justice of the peace for the borough, and so continues during the year next succeeding his year of office. Held;

1. That the mayor, while acting as a justice in and for the borough, was acting as a justice for the county, and therefore penalties imposed by him were to be paid to the treasurer of the county and not to the treasurer of the borough.

2. That stat. 11 & 12 Vict. c. 43. s. 31., which directs the clerk of the justices, in cases where the statute on which the information or complaint is framed contains no directions for the payment of the penalties or other sums of money, to pay them "to the treasurer of the county, riding, division, liberty, city, borough, or place" for which such justice shall have acted, means a liberty, city, borough or place which has a Court of Quarter Sessions.

11 & 12 Vict.
c. 43. s. 31.
Penalties, &c.
Payment to
treasurer of
county.
Borough not
having Quarter
Sessions.
5 & 6 W. 4.
c. 76. ss. 57.
111.

THIS was an action brought for the recovery of 48*l.* 12*s.* 6*d.*, being the amount of penalties and other sums of money adjudged and ordered by the justices of the peace of the borough of *Reigate* to be paid under and in pursuance of statutes containing no direction for the payment of those penalties and moneys to any particular person or persons, and received by the defendant as clerk to the justices.

The following case was stated without pleadings, according to The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. s. 42.

By Royal charter, dated the 11th *September*, 1863, the parliamentary borough of *Reigate*, since disfranchised (a), in the county of *Surrey*, was constituted a municipal

(a) See stat. 31 & 32 Vict. c. 6.

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borough with a corporation under the title of "The Mayor, Aldermen and Burgesses of the Borough of *Reigate*," having all the powers and privileges held and enjoyed by the boroughs named in the Schedules to stat. 5 & 6 *W. 4. c. 76.* as fully and effectually as if it had been one of the boroughs named in the first section of Schedule (B.) to the Act annexed; and Her Majesty did thereby extend to all the inhabitants of the borough of *Reigate* all the powers and provisions of that statute and of any other Acts amending or altering it or in anywise relating thereto.

The borough of *Reigate*, before the 11th *September*, 1863, formed part of the *Reigate* petty sessional division of the county of *Surrey*. There is no separate commission of the peace for the borough under sect. 98 of stat. 5 & 6 *W. 4. c. 76.*, and there has been no grant of a separate Court of Quarter Sessions of the peace to the borough. Since that date the justices of the peace for the county, by virtue of sect. 111, exercised the jurisdiction of justices of the peace for the borough, and acted concurrently with the mayor for the time being, who by sect. 57 is *ex officio* a justice of the peace for the borough, and so continues during the year next succeeding his year of office.

The defendant, previous to the 11th *September*, 1863, was clerk to the county justices acting out of Quarter Sessions in and for the *Reigate* petty sessional division, and since the incorporation of the borough he has acted as clerk to those justices both when acting as justices for the county out of Sessions and when acting as justices in and for the borough.

From the time of the incorporation of the borough there has always been a treasurer of it.

The defendant since the incorporation of the borough received divers sums of money amounting to 48*l.* 12*s.* 6*d.* ordered to be paid by the justices of the peace acting in and for the borough for fines and penalties and otherwise for offences committed against certain statutes, which statutes contain no directions for the payment of those moneys to any particular person or persons, and they have from time to time been paid over by him to the treasurer of the county of *Surrey*, to whom the defendant contended that they were payable.

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The question for the opinion of the Court was, whether the sums of money received by the defendant should have been paid by him to the treasurer of the borough or to the treasurer of the county.

It was admitted in the course of the argument that the fines and penalties in question were imposed for offences against public general Acts committed within the borough, and that all fines and penalties for offences against bye laws of the corporation of *Reigate* had been paid over to its treasurer.

Stat. 11 & 12 *Vict.* c. 43. s. 31. enacts, "That in every warrant of distress to be issued as aforesaid" (that is, for a penalty or other sum recovered before a justice or justices on summary conviction or order,) "the constable or other person to whom the same shall be directed shall be thereby ordered to pay the amount of the sum to be levied thereunder unto the clerk of the division in which the justice or justices issuing such warrant shall usually act; and if any person convicted of any penalty, or ordered by a justice or justices of the peace to pay any sum of money, shall pay the same to any constable or other person, such constable or other

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person shall forthwith pay the same to such clerk ; and if any person committed to prison upon any conviction or order as aforesaid for non-payment of any penalty, or of any sum thereby ordered to be paid, shall desire to pay the same and costs before the expiration of the time for which he shall be so ordered to be imprisoned by the warrant for his commitment, he shall pay the same to the gaoler or keeper of the prison in which he shall be so imprisoned, and such gaoler or keeper shall forthwith pay the same to the said clerk ; and all sums so received by the said clerk shall forthwith be paid by him to the party or parties to whom the same respectively are to be paid, according to the directions of the statute on which the information or complaint in that behalf shall have been framed ; and if such statute shall contain no such directions for the payment thereof to any person or persons, then such clerk shall pay the same to the treasurer of the county, riding, division, liberty, city, borough, or place for which such justice or justices shall have acted, and for which such treasurer shall give him a receipt without stamp ; and every such clerk, and every such gaoler or keeper of a prison, shall keep a true and exact account of all such monies received by him, of whom and when received, and to whom and when paid, in the Form (T.) in the Schedule to this Act annexed, or to the like effect, and shall once in every month render a fair copy of every such account unto the justices who shall be assembled at the Petty Sessions for the division in which such justice or justices aforesaid shall usually act, to be holden on or next after the first day of every month, under the penalty of forty shillings, to be recovered by distress in manner

aforesaid ; and the said clerk shall send or deliver every return so made by him as aforesaid to the clerk of the peace for the county, riding, division, liberty, city, borough, or place within which such division shall be situate, at such times as the Court of Quarter Sessions for the same shall order in that behalf."

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Macnamara, for the plaintiffs.—By sect. 31 of stat. 11 & 12 *Vict. c. 31.* the clerk of the division in which the justices issuing the warrant act is directed to pay the moneys received by him "to the treasurer of the county, riding, division, liberty, city, borough, or place for which such justice or justices shall have acted." It is immaterial whether the justices who imposed the penalties or ordered the sums of money to be paid were county or borough justices if at the time they were acting for the borough. The mayor and ex-mayor of *Reigate* are made justices of the peace for the borough by sect. 57 of stat. 5 & 6 *W. 4. c. 76.*, and they could only act as such. [*Lush J.* Justices of the county sitting within the borough and trying an offence committed there are not acting for the borough more than they are when sitting out of the borough and trying an offence committed within the petty sessional division for which they usually act. *Blackburn J.* There may be liberties and places in which, though there is no treasurer, the justices of the county have not jurisdiction. Must not the justices of those liberties and places be acting for the county within sect. 31 of stat. 11 & 12 *Vict. c. 43.* though they have authority only for portion of the county? Otherwise how are the penalties and other fines to be disposed of?] At any rate in the first instance the clerk should pay the sums received by him to the treasurer of the borough.

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[*Lush J.* Assuming that they are ultimately to reach the treasurer of the county, there is nothing to require that they should intermediately pass through the hands of the treasurer of the borough. And what power have the justices of the county over the treasurer of the borough? The form of account given in Schedule (T.), referred to in sect. 31, throws some light on the construction of the section: there is a column headed "Amount of fines received for county rate," and no column for any amount received for the borough rate.] Sect. 126 of stat. 5 & 6 *W. 4. c. 76.* only regulates the payment of penalties recovered before a justice of a borough in which a separate Court of Quarter Sessions is held.

Archibald, for the defendant.—The county justices act within the borough of *Reigate* independently of sect. 111 of stat. 5 & 6 *W. 4. c. 76.*, which must apply to other offences than those referred to in stat. 11 & 12 *Vict. c. 43.* Offences committed within the borough are county offences. [He referred to the judgment of the Court in *Rex v. Amos (a)*.] In *Reg. v. Dale (b)*, which was a conviction for not paying over to the treasurer of the county a moiety of a fine imposed under the Alehouse Act, 9 *G. 4. c. 61.*, it was held that sect. 26, which directs it to be paid to "the treasurer of the county or place for which such justices shall then act," meant a place having a Court of Quarter Sessions. *Jervis C. J.* said, pp. 50-1, "At the time the Alehouse Act passed, corporations had private property but no borough fund, properly so called, over which the Legislature could with justice exercise a control. The trea-

(a) 2 *B. & A.* 533. 542. 544.

(b) *Dears. C. C.* 37.

suror of the place, meant in this section, must clearly be the treasurer of a place having a Court of Quarter Sessions, an officer under the control of the justice making the order, with a fund under their control."

[*Lush J.* By sect. 31 of stat. 11 & 12 *Vict. c. 43.* the clerk is to render a monthly account to the justices at Petty Sessions and to the Quarter Sessions: the Quarter Sessions of the county have no interest in knowing what becomes of the fines and penalties payable to the borough fund.] And if the sums in question are paid to the treasurer of the borough the borough will have the benefit of them though, not having a Court of Quarter Sessions, it is relieved of the expenses of the prosecution and maintenance of prisoners. [He was then stopped.]

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Macnamara, in reply.—This question was not decided in *Rex v. Amos (a)*, and here the mayor and ex-mayor of *Reigate* are not county justices. [*Blackburn J.* In that case the Court, pp. 543-4, refer to two cases before Lord *Ellenborough* in *Trinity Term* 1816, not reported, in which a distinction was taken between offences which are borough offences cognisable by borough justices only and those which are borough and county offences triable either at the borough or the county Sessions: an act which is an offence only because done within the limits of the borough is a borough offence: an offence accidentally falling within the cognisance of borough justices is a county offence.] By sect. 57 of stat. 5 & 6 *W. 4. c. 76.* the mayor "shall be a justice of the peace of and for such borough." [*Lush J.* Such borough being still a part of the county.] In *Reg. v.*

(a) 2 *B. & A.* 533.

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Dale (a) the word "place" was construed with reference to the particular statute 9 G. 4. c. 61., at the time of the passing of which, as *Jervis* C. J. observed, p. 50, corporations had private property but no borough fund; and the word "borough" does not occur in sect. 26 of that statute.

BLACKBURN J. The case is now clear, and no further time is necessary for consideration. In *Rex v. Amos* (b) the borough of *Liverpool*, which had a Court of Quarter Sessions, but the justices of the borough had no exclusive jurisdiction, and consequently the Quarter Sessions of the county could try offences committed within the borough though the borough justices had jurisdiction also, the question raised was whether, when a borough justice had committed a prisoner to the county gaol for a felony committed within the borough, the borough Sessions could order him to be brought before them for trial; and it was decided that they might. The reason given in p. 542 is, that "the borough justices, therefore, and the borough Sessions, as far as they act upon what are at the same time borough and county offences, and borough and county offenders, act in ease and aid of the county justices and county Sessions, and discharge that duty which must otherwise be discharged by the county magistrates. To a certain extent, therefore, they are for that part of the county to which their power extends county magistrates;" and p. 544, after stating that, independently of stat. 15 G. 2. c. 24., justices of liberties might commit to county houses of correction to which those liberties contribute, it is said, "Upon what principle could that be but upon this,

(a) *Dears. C. C.* 37.

(b) 2 B. & A. 533.

that to this extent, and with reference to county offenders within their limits, they were in the nature of, and had the powers of county justices; and if this were their character, they must be considered as county justices for all purposes connected with the subject, and not for the purpose of commitment only." These two passages confirm my impression as to what is the solution of the question before us, viz., that in a borough where every thing relating to the trial of offences and to offenders may be done by justices of the county, the borough justices must be considered in the nature of if not altogether as county justices, though with powers limited to that part of the county which consists of the borough, and to such cases as occur within that part.

Then sect. 31 of stat. 11 & 12 *Vict. c. 43.* enacts, that all penalties and other sums recovered on summary conviction or order, and received by the clerk of the division in which the justice or justices usually act, shall be paid by him to the party to whom the same respectively are to be paid according to the directions of the statute on which the information or complaint was framed; "and if such statute shall contain no such directions for the payment thereof to any person or persons, then such clerk shall pay the same to the treasurer of the county, riding, division, liberty, city, borough, or place for which such justice or justices shall have acted." Is the mayor of *Reigate*, when he acts as a justice of the peace, acting for the borough or place, or for the county? Adopting the reasoning of the judgment in *Rex v. Amos* (a) the

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(a) 2 B. & A. 533.

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answer is, that he is acting for the county. The section then directs the clerk to keep an account of moneys received, and render a copy thereof to the justices in Petty Sessions; "and the said clerk shall send or deliver every return so made by him as aforesaid to the clerk of the peace for the county, riding, division, liberty, city, borough, or place within which such division shall be situate, at such times as the Court of Quarter Sessions for the same shall order in that behalf;" that is, the Quarter Sessions to which an appeal would lie whether the case was heard before the mayor or the justices of the county. Now the county, riding and division always have a Court of Quarter Sessions, and the city or borough generally have. When they have it is reasonable that they should receive penalties and other moneys, for the treasurer is under their controul, and they bear that part of the costs of the prosecution and confinement of prisoners which is not paid out of the consolidated fund. But where the appeal from the conviction is entirely to the Quarter Sessions for the county, and so much of the costs as are not paid out of the consolidated fund are defrayed out of the county rate, the intention of the Legislature must be that the penalties should be paid into the county fund; otherwise the borough fund would receive the benefit, and the county fund would bear the burden. And accordingly, in *Reg. v. Dale (a)*, *Jervis C. J.*, delivering the judgment of the Judges, said, p. 51, "It would be strange that the same words should give to one fund, the borough fund, all the penalties for good convictions, and charge upon another fund, the county rate, all the costs for convictions which could not

(a) *Dears. C. C.* 37.

be sustained ;” and it may be added, of good convictions also. The question there was, whether a moiety of a penalty which by sect. 26 of stat. 9 G. 4. c. 61. was to be paid to the treasurer “of the county or place” for which the justices were acting ought to be paid to the treasurer of the county or to the treasurer of the borough. The argument was on the meaning of the word “place” in that section, but the reasoning applies to the present case ; and we avoid the inconsistency mentioned in the judgment by holding, as in *Rex v. Amos (a)*, that the words “liberty, city, borough, or place” are limited to those which have a separate Court of Quarter Sessions so as to make them ejusdem generis as the preceding words “county, riding, division.”

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LUSH J. For the purpose of our decision I import into the case an agreed fact, that the offences were against the general law and not against any local statute or bye law. And then *Rex v. Amos (a)* decides that, though the jurisdiction of the justices in a borough is limited to the ambit of the borough and they are acting in the borough, they are acting as justices for the county. That being so, sect. 31 of stat. 11 & 12 Vict. c. 43. is free from ambiguity; it enacts that the penalties or other sums shall be paid to the clerk of the division in which the justice or justices usually act, and directs the clerk to pay the sums received by him “to the treasurer of the county, riding, division, liberty, city, borough, or place for which such justice or justices shall have acted.” Here by the hypothesis the justices have acted for the county not for the borough, and the clerk is to

(a) 2 B. & A. 533.

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keep an account of all moneys received by him, and render a copy of it to the justices at the Petty Sessions for the division in which they usually act, and send a return "to the clerk of the peace for the county, division, liberty, city, borough, or place within which such division shall be situate, at such times as the Court of Quarter Sessions for the same shall order in that behalf." In the present case the only Court of Quarter Sessions which could make such an order is that for the county; and if the construction of the section is that the clerk of the justices receiving a penalty is to pay it over to the treasurer of the county and render a return to the clerk of the peace of the county the whole section will be consistent and its provisions most fair and reasonable; for if a man fined for an offence spends a fortnight in the county gaol and then pays the penalty it would be strange that it should go to the treasurer of the borough in aid of the borough rate and not to the treasurer of the county in aid of the county rate which bears the burden.

Our judgment therefore must be for the defendant.

Judgment for the defendant.

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JONES and another *against* JUST.Monday,
February 19th.

1. In every contract to supply goods of a specified description which the buyer has no opportunity to inspect, they must not only in fact answer the specific description, but must also be saleable or merchantable under that description.

2. *Seem*, that the maxim *caveat emptor* does not apply where there has been no opportunity of inspection, or that opportunity has not been waived.

3. The plaintiffs, through their brokers, entered into a contract with the defendant for the purchase of a quantity of *Manilla* hemp to arrive at *Liverpool* from *Singapore* by four named ships. The ships arrived with the respective numbers of bales of hemp, with marks corresponding to those specified in the contract, and they were delivered to the plaintiffs and the price was paid. On examination of the bales they were found in such a state as to afford strong evidence that they had at some time, probably from a shipwreck when on the voyage from *Manilla* to *Singapore*, been wetted through with salt water, had afterwards been unpacked and dried, and then repacked in the bales and shipped at *Singapore*. The hemp was not damaged to such an extent as to make it lose the character of hemp. If in good condition it would have been what is called fair current *Manilla* hemp. The plaintiffs sold the hemp by auction as "*Manilla* hemp with all faults," and it realized 75 per cent. of the price which similar hemp would have fetched if undamaged. Held,

(1). That an action would lie against the defendant for breach of contract as it was an implied term of the contract that the hemp should be *Manilla* hemp, and in a reasonably merchantable condition.

(2). That the measure of damages was the difference between what the hemp was worth when it arrived and what the same hemp would have realized if it had been shipped in the state in which it ought to have been shipped.

4. The Mercantile Law Amendment Act, *Scotland*, 1856, 19 & 20 *Vict. c. 60. s. 5.*, only declares that a seller of goods without knowledge that they are defective or of bad quality shall not be held to have warranted their quality or sufficiency.

Contract of
sale.Goods of
specified de-
scription.

Implied term.

Merchantable
condition.

Caveat emptor.

Measure of
damages.Mercantile
Law Amend-
ment Act,*Scotland*, 1856,19 & 20 *Vict.**c. 60. s. 5.*

THE first count of the declaration stated that in consideration that the plaintiffs would buy from the defendant certain bales of *Manilla* hemp shipped at *Singapore* and expected to arrive by certain ships, at a certain price, that is to say, 38*l.* 10*s.* per ton of 2240 lbs., cost freight and insurance, shipping weight, payment to be made in cash against shipping documents, less 2½ per centum discount, on the 21st *October*, 1865, the

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defendant promised the plaintiffs that the hemp should be merchantable and should be saleable as *Manilla* hemp unless it had become unmerchantable and not saleable as *Manilla* hemp from perils of the seas and navigation after being shipped at *Singapore*; that the plaintiffs bought the hemp from the defendant; that the shipping documents were duly handed by the defendant to the plaintiffs. Averment of conditions precedent having happened. Breach. That the hemp was not merchantable, and the hemp was not saleable as *Manilla* hemp, and had not become unmerchantable and not saleable as *Manilla* hemp from perils of the seas and navigation after being shipped at *Singapore*.

Second count. That in consideration that the plaintiffs would buy from the defendant certain bales of *Manilla* hemp as shipped at *Singapore* and expected to arrive by certain ships, at a certain price, that is to say, 38*l.* 10*s.* per ton of 2240 lbs, cost freight and insurance, shipping weight, payment to be made in cash against shipping documents, less 2½ per cent. discount, on the 21st *October*, 1865, the defendant promised the plaintiffs that the hemp was in good and merchantable condition when shipped at *Singapore*, that the plaintiffs bought the hemp from the defendant and that the shipping documents were duly handed by the defendant to them. Averment of all conditions precedent having happened. Breach. That the hemp when shipped at *Singapore* was not in a good and merchantable condition, and was damaged, spoiled, worthless and inferior.

Third count. That by warranting certain hemp to be of average quality the defendant sold it to the plaintiffs at a certain price, cost freight and insurance.

Breach. That the hemp was not of average quality, and was of inferior quality and valueless to the plaintiffs.

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Fourth count. That the defendant, by warranting certain hemp to be *Manilla* hemp and to be saleable as *Manilla* hemp, sold the same to the plaintiffs at a certain price, cost freight and insurance. Breach. That the hemp was not *Manilla* hemp and was not saleable as *Manilla* hemp, and was valueless to the plaintiffs.

Each count alleged special damage.

Pleas. First, a denial of the contracts in the several counts mentioned.

Second, a denial of the alleged warranty and breaches of promise in the several counts alleged.

Issues thereon.

On the trial, before *Blackburn J.*, at *Liverpool*, at the Winter Assizes, 1866, it appeared that the plaintiffs, through Messrs. *Beneke & Co.*, their brokers, entered into a contract with the defendant for the purchase of a quantity of *Manilla* hemp to arrive. The sold note was in the following terms :—

“ 19 Oct., 1865.

“ We have this day sold for you the following goods to Messrs. *J. A. Beneke & Co.* :—T. A. V. 200 bales *Manilla* hemp, expected to arrive per *Richard Cobden* a *Singapore* for *Liverpool*. 809 . . . expected to arrive pr. *Christopher Newton* a *Singapore* for *Liverpool*. 209 . . . expected to arrive p. *Fortitude* a *Singapore* for *London*.

H. 193 } expected to arrive pr. *Ophen* a *Singapore* for
H. H. 1 } *Liverpool*.

“ At 38*l.* 10*s.* 0*d.* per ton of 2240 lbs., cost freight and insurance, shipping weight. Payment cash against

1868. shipping documents on 21st Oct., 1865, less 2½ %
discount."

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The shipping documents were duly delivered to the plaintiffs and the price was paid. All the vessels named in the contract arrived in due course with the respective numbers of bales of hemp, with marks corresponding to those specified in the contract, on board, and they were delivered to the plaintiffs. On examination of the bales it was found that the whole of those marked T. A. V. were in such a state as to afford strong evidence that they had at some time, probably from a shipwreck when on the voyage from *Manilla* to *Singapore*, been wetted through with salt water, had afterwards been unpacked and dried, and then repacked in the bales which were afterwards shipped at *Singapore*. *Manilla* hemp is divided into several qualities. The hemp in the bales in question, if in good condition, would have been what is called fair current *Manilla* hemp, which is not the lowest quality, but in all the bales the hemp was damaged to some extent though not so far as to make it lose the character of hemp. After some correspondence between the parties the hemp was sold by auction by the plaintiffs' orders "as *Manilla* hemp with all faults," and at the auction it realized about 75 per cent. of the price which similar hemp would have fetched if undamaged. The price of hemp had risen considerably since the contract, so that the proceeds of the sale were very nearly equal to the invoice price. There was no attempt to shew that the defendants knew of the state in which the hemp had been shipped at *Singapore*.

At the close of the plaintiffs' case the counsel for the defendant contended that in point of law under this written contract there was no further condition or war-

ranty than that the bales on their arrival should answer the description of bales of *Manilla* hemp, which they did, as was proved by the fact that the hemp, though sold with a stigma upon it, fetched a price only 25 per cent. below that of sound hemp; that as to quality or condition there was no warranty; and consequently that the maxim caveat emptor applied.

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The learned Judge expressed an opinion adverse to this view. He said, "I think that the question is for the jury, whether what was supplied under this contract was, when shipped at *Singapore*, such as to answer the description of reasonably merchantable *Manilla* hemp, that being the warranty which I think the law implies in a contract to supply which this is, though it would be different in a sale of specific things which the purchaser might examine, or of things sold by sample. And I think the question whether it is fairly and reasonably merchantable is a question of more or less, which it must be left to the jury as reasonable men to determine." He then reserved leave to move to enter the verdict for the defendants if there was no evidence to go to the jury of a breach of warranty.

Upon this intimation of opinion the counsel addressed the jury, and the case was left to them substantially to the effect above stated; and the jury were further told that if they found for the plaintiffs the damages should be measured by what the hemp was worth when it arrived compared with what the same hemp would have realized had it been shipped in the state in which it ought to have been shipped, thus in effect giving the plaintiffs the benefit of the rise in the market.

The jury found for the plaintiff, damages 756*l*.

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In the ensuing Term, *Brett* obtained a rule to enter the verdict for the defendant pursuant to the leave reserved, or for a new trial on the ground of misdirection as to the measure of damages, which he contended ought at most to have been the difference between the value of the article actually delivered, viz., fair average *Manilla* hemp in a damaged state, and the value of sound *Manilla* hemp of the lowest quality which might have been supplied at *Singapore* under this contract.

There were other objections to the direction which were substantially only varied modes of putting the point reserved.

In *Trinity* Vacation, *June* 15, 1867, before COCKBURN C. J., BLACKBURN, MELLOR and SHEE JJ.,

Temple and *Charles Russell* shewed cause.—In a contract of sale of goods which cannot be seen by the purchaser it is implied by law that they shall be of reasonably merchantable quality; *Holcombe v. Hewson* (a), *Cooper v. Twibill* (b), *Gardiner v. Gray* (c), *Barr v. Gibson* (d), *Wieler v. Schilizzi* (e), *Turner v. Mucklow* (f), *Josling v. Kingsford* (g). The hemp should have been in such condition that the plaintiffs might have been able to go into the market and find a purchaser for it on the same terms as they bought it.

In *Hilary* Term, *January* 11, 1868, before COCKBURN C. J., BLACKBURN and MELLOR JJ.,

(a) 2 *Camp.* 391.(b) 3 *Camp.* 286, note (a).(c) 4 *Camp.* 144.(d) 3 *M. & W.* 390.(e) 17 *C. B.* 619.(f) 8 *Jur. N. S.* 870; 6 *L. T. N. S.* 690.(g) 13 *C. B. N. S.* 447.

Brett and *Holker*, in support of the rule.—In the case of a sale of specific goods, where neither the vendor nor the purchaser has the opportunity of seeing them, or knows the quality or condition of the goods, and they are not sold for a particular purpose declared at the time, there is no implied warranty of their quality or condition, but only that they answer the description in the contract and are saleable in the market under the denomination mentioned in it. [They cited *Gardiner v. Gray* (a), per Lord *Ellenborough*, *Parkinson v. Lee* (b), and *Stuart v. Wilkins* (c) there cited, *Gray v. Cox* (d), *Chanter v. Hopkins* (e), *Ollivant v. Bayley* (f), *Burnby v. Bollett* (g), *Nichol v. Godts* (h), *Emmerton v. Matthews* (i). In 2 *Kent Comm.* 479-480, note (a), 6th ed., 660-1, note (a), 10th ed., after referring to “the new *English* doctrine, which raises, on a fair sale of an article of goods or merchandise, the implied warranty that it is *merchantable*, or *fit for the purpose intended*,” and to some *American* cases, as going quite as far at least as any of the *English* cases, and trenching deeply upon the plain maxim of the common law caveat emptor, the author adds, “I cannot but think that the old rule, and the old decisions, . . . were the safest and wisest guides; and that the new doctrine carried to this extent, will lead to much difficulty and vexatious litigation in mercantile business.” [*Blackburn J.* The majority of the *American* decisions have gone farther even than the *English*. His Lordship referred to *Sedgwick*

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JUST.(a) 4 *Camp.* 144, 145.(c) 1 *Doug.* 18.(e) 4 *M. & W.* 399.g) 16 *M. & W.* 644.(b) 2 *East* 314.(d) 4 *B. & C.* 108.(f) 5 *Q. B.* 288.(h) 10 *Exch.* 191.(i) 7 *H. & N.* 586.

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on *Damages*, p. 333, note 1, 4th ed.] The Mercantile Law Amendment Act, *Scotland*, 1856, 19 & 20 *Vict.* c. 60. s. 5., which assimilates the law of *Scotland* to the law of *England*, assumes that there are only two warranties in the law of *England*; first, in the case of the sale of a specific article; secondly, where goods are sold for a particular purpose. [*Blackburn J.* The statement in sect. 5 is what a *Scotch* lawyer who drew the Act supposed to be the law of *England*.] At any rate the ruling of the learned Judge leaves the matter too much at large. [He also cited *Roux v. Salvador*, in error (a).]

Cur. adv. vult.

MELLOR J. now delivered the judgment of the Court. (After stating the facts proved at the trial and the direction of the learned Judge.)—We think that if the contract had the effect which the direction of my brother *Blackburn* stated it to have, the true measure of the damages was given, as it put the plaintiffs in the position in which they would have been if the contract had been fulfilled, but we took time to consider the question as to what the contract really was, which is no doubt one of importance and difficulty.

After careful consideration we are of opinion that the direction was substantially correct.

On the argument before us it was contended that the contract was performed on the part of the defendant by the shipping at *Singapore* of an article which answered the description of "*Manilla* hemp," although at that time it was so damaged as to have become unmerchantable. It was said that, there being no fraud on the

(a) 3 *Bing. N. C.* 266.

part of the vendor and both parties being equally ignorant of the past history and actual condition of the article contracted for, and neither of them having had the opportunity of inspecting it, it was the duty of the vendee to have stipulated for a merchantable article if that was what he intended to contract for. In other words, that the maxim "caveat emptor" applied in such a case in the same way as on a sale of a specific article by a person not being the manufacturer or producer, even though the defect was latent and not discoverable upon examination.

We are of opinion that there is a great distinction between the present case and the sale of goods in esse, which the buyer may inspect, and in which a latent defect may exist although not discoverable on inspection.

The cases which bear upon this subject do not appear to be in conflict when the circumstances of each are considered. They may, we think, be classified as follows. First. Where goods are in esse and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim caveat emptor applies, even though the defect which exists in them is latent and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer; *Parkinson v. Lee* (a). The buyer in such a case has the opportunity of exercising his judgment upon the matter, and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality, or are merchantable. So in the case of the sale in a market of meat which the buyer had inspected but

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(a) 2 East 314.

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which was in fact diseased and unfit for food, although that fact was not apparent on examination, and the seller was not aware of it, it was held that there was no implied warranty that it was fit for food, and that the maxim *caveat emptor* applied; *Emmerton v. Mathews* (a). Secondly. Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty; *Barr v. Gibson* (b). Thirdly. Where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known described and defined thing be actually supplied there is no warranty that it shall answer the particular purpose intended by the buyer; *Chanter v. Hopkins* (c), *Ollivant v. Bayley* (d). Fourthly. Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied; *Jones v. Bright* (e), *Brown v. Edgington* (f). In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own. Fifthly. Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a

(a) 7 H. & N. 586.

(c) 4 M. & W. 399.

(e) 5 Bing. 533.

(b) 3 M. & W. 390. 399.

(d) 5 Q. B. 288.

(f) 2 M. & G. 279.

merchantable article; *Laing v. Fidgeon* (a). And this doctrine has been held to apply to the sale by the builder of an existing barge which was afloat but not completely rigged and furnished; there, inasmuch as the buyer had only seen it when built and not during the course of the building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use; *Shepherd v. Pybus* (b). If therefore it must be taken as established that on the sale of goods by a manufacturer or dealer to be applied to a particular purpose it is a term in the contract that they shall reasonably answer that purpose, and that on the sale of an article by a manufacturer to a vendee who has not had the opportunity of inspecting it during the manufacture it shall be reasonably fit for use or shall be merchantable as the case may be, it is difficult to understand why a similar term is not to be implied on a sale by a merchant to a merchant or dealer who has had no opportunity of inspection. Accordingly, in the case of *Bigge v. Parkinson, in error* (c), upon a contract to supply provisions and stores to a ship guaranteed to pass the survey of the *East India Company's* officers, it was held by the Court of Exchequer Chamber that there was an implied term in the contract that the stores should be reasonably fit for the purpose for which they were to be supplied, notwithstanding that the vendor had specially contracted that they should pass the survey of the *East India Company's* officers.

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We are aware of no case in which the maxim *caveat emptor* has been applied where there had been no

(a) 4 *Camp.* 169; *S. C.* 6 *Taunt.* 108.(b) 3 *M. & G.* 868.(c) 7 *H. & N.* 955. 961.

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opportunity of inspection or where that opportunity had not been waived. The case of *Gardiner v. Gray* (a) appears strongly in point to the present; the contract was for the sale of twelve bales of waste silk imported from the Continent, and before it was landed samples were shewn to the plaintiff's agent, and the bargain was then made but without reference to the sample. It was purchased in *London* and sent to *Manchester*, and on its arrival there was found to be of a quality not saleable under the denomination of "waste silk." Lord *Ellenborough* expressed his opinion, p. 145, "That under such circumstances, the purchaser had a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply."

In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description, and if they do not it is unnecessary to put any other question to the jury: thus, in *Wieler v. Schilizzi* (b), and in *Josling v. Kingsford* (c), the substantial question put to the jury was, did the goods delivered reasonably answer the description in the contract, and, the answer of the jury being that they did not, that answer sufficed to determine each case. In the first of these cases, there was no opportunity to inspect, in the second there was. So in the case of *Nichol v. Godts* (d), where the contract was for the sale of foreign refined rape oil warranted only

(a) 4 *Camp.* 144.(c) 13 *C. B. N. S.* 447.(b) 17 *C. B.* 619.(d) 10 *Exch.* 191.

equal to sample, it was held, in an action for not accepting the article tendered, that it was necessary for the vendor to establish that it was not only equal to the sample as to quality, but that it was in fact such an article as answered the description of foreign refined rape oil. In *Wieler v. Schilizzi* (a), in which there was no opportunity to inspect, and no express stipulation as to quality, it would have been necessary, had the finding of the jury affirmed that the article delivered did in fact answer the description of *Calcutta* linseed, to determine whether the Judge ought not to have put the further question whether it was reasonably merchantable. It certainly was not determined that such question would have been wrong, though perhaps the words "tale quale" in that contract might have the effect of excluding any such warranty, and *Willes* J., in his judgment, said, p. 624, that the purchaser in that case "had a right to expect, not a *perfect* article, but an article which would be saleable in the market as *Calcutta* linseed."

It appears to us that in every contract to supply goods of a specified description which the buyer has no opportunity to inspect the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description. In the words of Lord *Ellenborough*, in *Gardiner v. Gray* (b), "without any particular warranty this is an implied term in every such contract." In the present case the question appears to be, was the article as shipped at *Singapore* merchantable or saleable in the market under the description of *Manilla* hemp? My brother *Blackburn* appears to have divided the question into two, viz., was the article in fact *Manilla* hemp? Secondly, was it merchantable? The precise mode of submitting the question is not

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(a) 17 C. R. 619.

(b) 4 Camp. 144, 145.

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material provided the substantial direction was correct, as we think it was.

The counsel for the defendant relied upon a case of *Turner v. Mucklow* (a), tried before me in the year 1862, at *Liverpool*. In that case the plaintiffs were calico printers, and had contracted to sell to the defendant, who was a dry salter and dye extract manufacturer, a boat load of spent madder. The defendant not finding the spent madder supplied suitable for his purpose repudiated the contract, and refused to pay for it. It appeared that the plaintiffs in their trade as calico printers used large quantities of madder root, having extracted from which the finer colouring matter by chemical processes they placed the refuse or spent madder in a large heap in their yard. They occasionally used portions of it, and by the application of other chemical processes, extracted from it a colouring matter called garancine, but they did not manufacture spent madder for sale. On a previous occasion they had sold to the defendant, who was a manufacturer of garancine, a small quantity of spent madder from their accumulation, and on the occasion in question the defendant by letter bargained with the plaintiffs for a quantity of their spent madder, which he did not inspect before delivery, and upon a portion of it being used by him for the purpose of manufacturing garancine it turned out that the garancine produced by it was of very inferior quality and unmarketable. The jury were directed that if the article supplied fairly and reasonably answered the description of "spent madder" there was no implied warranty that it was of any particular quality or fitness for any particular use, and upon that direction the jury

(a) 8 *Jur. N. S.* 870; 6 *L. T. N. S.* 690.

found a verdict for the plaintiffs. Upon the argument, on a rule which was obtained for a new trial on the ground of misdirection, the Court of Exchequer held the direction to be right, *Martin B.* declaring his opinion to be, 8 *Jur. N. S.* 871, "that no direction was ever more correct." In that case it is to be observed that the defendant had the opportunity, if he had chosen to avail himself of it, to inspect the heap of spent madder; he knew that it was the refuse madder after it had gone through the plaintiffs' processes, and that it was not manufactured for sale. These circumstances entirely distinguish that case from the present.

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The counsel for the defendant also relied upon stat. 19 & 20 *Vict. c.* 60. s. 5. as a sort of implied legislative declaration of the law of *England* upon that subject in favour of his argument, but upon examining the section referred to it does not appear to bear out that view, for all that it declares is that a seller of goods without knowledge that they are defective or of bad quality shall not be held to have warranted their quality or sufficiency.

It has already appeared that there is not in general, on the sale of goods in *England* to be supplied, an implied warranty that they shall be of any particular quality or sufficient for any particular purpose, but merely that they shall be merchantable goods of the description bargained for. The present case depends on the distinction between a sale of particular articles and a contract to supply articles of a particular kind.

The authority of Chancellor *Kent* (a) was also appealed to, but as the *American* cases which he cites are generally adverse to his opinion it can at most be said that the opinion of an eminent writer is opposed to the authority of the cases which he cites.

(a) 2 *Kent Comm.* 479-480, note (a), 6th ed.; 660-1, note (a), 10th ed.

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It appears to us in the result of this case that the maxim of caveat emptor cannot apply, and that it must be assumed that the buyer and seller both contemplated a dealing in an article which was merchantable. The buyer bought for the purposes of sale, and the seller could not, on any other supposition than that the article was merchantable, have found a customer for his goods, and the buyer must be taken to have trusted to the judgment, knowledge and information of the seller, as it is clear that he could exercise no judgment of his own; and this appears to us to be at the root of the doctrine of implied warranty, and that in this view it makes no difference whether the sale is of goods specially appropriated to a particular contract or to goods purchased as answering a particular description.

It was contended further by the defendant's counsel that the shippers at *Singapore* were the persons who selected the goods in question, and that the defendant who merely sold them to arrive were as little aware of their true condition, when shipped, as the plaintiffs, but it is clear that the defendant, if not directly connected with the shippers as their correspondents, must at least have purchased from them, and had a remedy against them for not supplying an article reasonably merchantable. The remarks of *Cockburn* C. J. during the argument in *Bigge v. Parkinson* (a), which, though not in terms repeated by him in delivering the judgment of the Court of Exchequer Chamber are really involved in it, are very closely in point here.

We are therefore of opinion that the direction of *Blackburn* J. was right, and that this rule must be discharged.

Rule discharged.

(a) 7 H. & N. 955. 959.

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IN THE EXCHEQUER CHAMBER.

FITZPATRICK *against* BOURNE.[Monday,
May 11th.]

A deed of arrangement under The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192., provided for the payment in full of the costs of a previous deed of inspectorship, and all costs, charges and expenses incurred by the inspectors for the benefit of the estate, including the costs of an execution creditor, in consideration of the execution being withdrawn. Held by the Queen's Bench, and affirmed by the Exch. Ch., that the deed was valid on the grounds

1. That the inspectors had an equitable lien for those costs on the bankrupt's estate.

2. That payment of a doubtful claim is not *ultra vires*, or alien to the payment of the debts of the debtor and his release therefrom, and the winding up of his estate.

Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192. Deed of inspectorship. Subsequent deed of arrangement. Costs of first deed. Equitable lien. Payment of doubtful claim.

ACTION on bills of exchange. Plea. A deed of arrangement and assignment to a trustee for the benefit of creditors under the 192nd section of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134.

The replication set out the deed, mentioned in the plea, made on the 14th *January*, 1867, between the defendant of the first part, *J. Bewley* of the second part, and the creditors of the defendant of the third part, by which: after reciting that by an indenture dated the 2nd *December*, 1865, and made between the defendant of the first part, the creditors of the defendant of the second part, and *C. M. Brown, M. Barton and J. Preston* of the third part, the parties thereto of the second part thereby granted to the defendant during three months from the execution thereof licence to carry on his trade or business of a coal proprietor, and to work the mines or colliery therein mentioned, and to sell the coals or minerals therein produced, under the direction or control of *C. M. Brown, M. Barton and J. Preston*, thereafter called the inspectors, and the defendant covenanted with

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the inspectors that he would execute and do all such assurances and things as in the judgment of the inspectors should be necessary for the purpose of raising money upon the security of the colliery for the purpose of carrying on and working the same, and would divide the money to arise from the sale of the coal and the money to be raised by the inspectors in the way therein indicated rateably among the creditors, and that it was agreed that the inspectors might bring, prosecute or discontinue or compromise any action, suit or other proceeding concerning the estate, and might retain out of the estate all costs, charges and expenses in anywise relating thereto, and that the inspectors might sell the coal so produced from the colliery, and that it should be lawful for the inspectors to raise any sum by way of mortgage of the colliery, and that all money obtained by the inspectors from the working of the colliery or by way of mortgage should be applied in the first place in payment of the costs of the indenture in recital, and all costs incidental to the arrangement with the creditors and to the preparation, execution and registration of the same indenture and of and incidental to the carrying out of the trusts and provisions thereof, including the costs, charges and expenses and loss of time incurred in the carrying on of the business and in raising money as aforesaid, and in the next place in paying to the defendant such remuneration as the inspectors might think fit, and in the third place in paying rateably all the creditors the respective amounts owing to them by the defendant; and further reciting that the indenture of the 2nd *December*, 1865, was executed by a majority in number representing three-fourths in value of the creditors of the defendant,

and was duly registered under the 193rd section of The Bankruptcy Act, 1861; that since the date of the recited deed various meetings of the creditors had taken place and divers attempts been made by the inspectors and by the defendant with the sanction of the inspectors to sell the colliery and to raise money on the security of the same, all which attempts proved abortive in consequence of the lessor of the mines refusing to consent to an assignment of the same, although he was made aware that a larger price had been offered; that various expenses were incurred with the sanction of the inspectors in carrying out the trusts and provisions of that indenture, and also in defending certain proceedings instituted by the lessor of the collieries to recover possession of the same, and in advising with counsel as to the rights of the lessor and the expediency of applying to Chancery for relief, and in defending certain actions brought by creditors of the defendant after the deed had been registered, and in working the collieries by the inspectors; that *The London Joint Stock Discount Company* issued an execution against the defendant under which the sheriff seized; that the inspectors agreed to pay the costs of the Discount Company and the costs of the sheriff in consideration of the execution being withdrawn, as a levying of execution by the sheriff would have caused the forfeiture of the collieries; that the costs were advanced accordingly, and had not been repaid to the person advancing them; that the costs, charges and expenses thereinbefore recited to have been incurred by the inspectors or with their sanction were incurred for the benefit of the estate of the defendant; and that at a meeting of the creditors of the defendant it was

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such assignment he should be released from the debts
due to his creditors and his estate wound up under a
deed of arrangement: IT WAS WITNESSED that the defend-
ant assigned to *J. Bewley* all his real and personal estate
upon trust to call in, collect and receive the same, and
to sell and convert into money the saleable parts thereof,
with power to postpone the sale of any part and to lease
the unsold part. And it was thereby agreed and declared
that the trustee should stand possessed of the money to
arise from such calling in and collection, receipt, leasing
and sale after payment thereout of all costs and expenses
of and incidental to such calling in, receipt, leasing and
sale: Upon trust thereout after payment of the costs of
the arrangement of 1865 and of the registered deed, and
all costs, charges and expenses thereinbefore recited or
referred to as having been incurred by the inspectors or
with their sanction for the benefit of the estate of the
defendant, and the costs of and incidental to those
presents and the registration of the same, and incidental
to the arranging terms of compromise with the lessor of
the collieries, and also the usual costs, charges and
disbursements of *J. Bewley* and his clerks or assistants
for the services which he might render and perform
on account of the estate or for or with reference to
the realization and collection of the assets; and to
pay the residue in or towards payment rateably and
without preference or priority of the debts now due
from the defendant to all the creditors. The deed con-
tained among others the following clause:—"And it is
hereby further agreed and declared that it shall and

may be lawful for the said trustee or the trustees or trustee for the time being to give time for the payment of any debt or debts owing to the said *T. R. Bourne*, and to accept payment thereof by instalments, composition or otherwise, and to abandon any debt or debts which he the said trustee or the trustees or trustee for the time being shall consider bad. And also to make such arrangements as he or they may think expedient with any creditor or other person holding any portion of the estate and effects of the said *T. R. Bourne* by way of mortgage, pledge or lien, in order to redeem or discharge such pledge or lien or to release the equity of redemption thereof. And also in case of any dispute with any person or persons whomsoever, being a debtor or debtors or creditor or creditors of the said *T. R. Bourne*, it shall be lawful for the said *J. Bewley* or the trustees or trustee for the time being hereof at his or their discretion to adjust or settle the amount of all or any such claims, demands or damages in such manner as to him or them shall seem most advantageous, or if need be to refer the same to arbitration or to have the amount of such damage assessed in due course of law." The deed also contained a release of the defendant by his creditors, and a clause that if there was anything in those presents not authorized by the provisions of The Bankruptcy Act, 1861, such unauthorized thing should be obligatory only on those persons who should have executed or assented to those presents. Also a declaration that those presents were intended to be a trust deed for the benefit of all the creditors of the defendant within the meaning of the provisions of the 192nd section of The Bankruptcy Act, 1861 ; and that it should

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be lawful for *J. Bewley*, his executors, administrators or assigns, at the expense of the trust estate, to take, adopt and defend all such measures and proceedings as he or they might be advised in order to give effect to those presents and to establish the validity thereof as such trust deed. The replication then set out the deed of the 2nd *December*, 1865, in part recited in the deed of the 14th *January*, 1867, and made between the defendant of the first part, the creditors of the defendant of the second part, and *G. M. Bourne*, *M. Barton* and *J. Preston* of the third part, by which; after reciting that by two indentures dated the 13th *June*, 1863, and made between *E. Cardwell* of the one part and the defendant of the other part, certain mines and hereditaments were demised by *E. Cardwell* unto the defendant, his executors, administrators and assigns; during a term of sixty years from the 1st *January*, 1863, at the rent therein reserved and subject to a proviso that in case the lessee should become bankrupt or compound his debts or assign his estate for the benefit of his creditors, or if proceedings should issue against him whereby any part of the mines should be taken in execution, and the amount for which such mines were taken in execution should not be paid within twenty-eight days after seizure thereof, it should be lawful for *E. Cardwell* to re-enter into the demised mines and premises and immediately thereupon the lease should determine; and that the lessee covenanted that he would not at any time during the term (save and except for the purpose of admitting a partner or partners or for the purpose of a security or securities for a loan of money for the use of the colliery) assign over or otherwise part with the possession of the mines and

premises, or any part thereof, without the licence or consent in writing of *E. Cardwell*, his heirs or assigns ; and that the defendant had during the last two years been engaged in opening up the mines of coal comprised in those indentures, and in the course of his operations had become indebted to the parties thereto of the second part in divers sums of money which he was unable to pay in full at that time but expected to be able to do so in the course of three calendar months ; and that at a meeting of the creditors, held on the 18th *November*, 1865, it was resolved that the colliery should be carried on by him for three months under the inspection of *G. M. Bourne*, *M. Barton* and *J. Preston* ; and that power should be given to the inspectors, if necessary, and so far as could lawfully be done, to raise funds for the purpose of carrying on the colliery : IT WAS WITNESSED that in consideration of the premises the parties thereto of the second part did grant unto the defendant during three months from the date of his execution of those presents licence to carry on his trade or business of a coal proprietor and work the mines or colliery, and to sell the coals and minerals thereby produced, under the direction, inspection and control of *G. M. Bourne*, *M. Barton* and *J. Preston*, thereafter called the inspectors ; and did agree with the defendant that if any of the creditors respectively should during the continuance of the licence, either in law, equity or bankruptcy or otherwise, arrest, imprison, sue or proceed against him or his estate or effects for or on account of any debt or demand from or upon him those presents might be pleaded in bar to all actions, suits or proceedings in respect thereof with the same effect as an order of discharge under an adjudication

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of bankruptcy in case he had been made a bankrupt. Proviso for revocation of the licence in case there should be any wilful violation of the directions of the inspectors in breach of the covenants on the part of the defendant. Covenant by *T. R. Bourne* with the inspectors to render to the inspectors an account of the colliery and keep books of account open to their inspection, and under the inspection and control of the inspectors to the best of his skill and ability manage and carry on the trade or business of a coal proprietor and work the colliery and sell the coals and minerals obtained by such working ; and that he would not by proceedings in bankruptcy or otherwise during the next three months withdraw himself or his estate from the engagements in those presents contained, &c. ; and would execute and do all such assurances as in the judgment of the inspectors should be necessary for the purpose of raising money upon the security of the colliery for the purpose of carrying on and working the same. IT WAS ALSO WITNESSED that in consideration of the premises all the parties thereto, for themselves and their respective partners, did covenant and agree, “ 1. That the estate of the said *T. R. Bourne* shall be administered as in bankruptcy. 2. That the said *T. R. Bourne* shall carry on the business of the said colliery under the joint direction of the said inspectors, but the said inspectors shall not give any direction or interfere in the business unless they are unanimous in such direction or interference. 3. That the said inspectors may employ and discharge any solicitors, agents, miners, workmen, clerks and other persons they may consider necessary for administration of the said estate and at such remuneration or wages as the said

inspectors may think proper. 4. The said inspectors may bring, prosecute or discontinue or compromise any action, suit or other proceeding concerning the said estate, and may retain or require payment out of the said estate of all costs, charges and expenses in anywise relating thereto, and the said inspectors may give to the said *T. R. Bourne* any remuneration they may consider him entitled to for his services in working the said estate. 5. That the said inspectors may sell the coal produced from the said colliery and give time for payment by instalments or otherwise and either with or without security. 6. That it shall be lawful for the said inspectors to raise any sum by way of mortgage of the same. 7. That all money obtained by the said inspectors from the working of the said colliery or by way of mortgage shall be applied in the first place to payment of the costs of these presents and all costs incidental to the arrangement with the creditors and to the preparation, execution and registration of these presents and of and incidental to the carrying out the trusts and provisions of these presents, including the costs, charges and expenses and for loss of time incurred in the carrying on the said business and in raising money as aforesaid, and in the second place in paying to the said *T. R. Bourne* such remuneration as the said inspectors may think fit for his services in carrying on the said business and realizing the said coals, and in the third place in paying rateably all the creditors the respective amounts owing to them by the said *T. R. Bourne* without preference or priority at such time or times and in such manner as the said inspectors shall determine, and the surplus if any shall be refunded and paid over to the said *T. R. Bourne*. 8. That nothing herein contained

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shall prejudice or affect the rights or remedies of the said creditors against any person other than the said *T. R. Bourne*. 9. That in case the money to be raised or obtained by the said inspectors from the working of the said mine or by way of mortgage shall be insufficient to defray the costs, charges and expenses incurred in the discharge of the trusts of these presents the deficiency shall be borne by such of the said creditors as shall accept these presents rateably in proportion to the amounts of their respective debts." And *T. R. Bourne* thereby gave power to the inspectors in his name to sue for, recover, receive and give valid receipts for all debts due and owing to him. "And it is hereby declared by all parties to these presents that the said inspectors, or any of them, may compound for such debts or debt or accept security for their payment or give time for such payment or refer the said debts to arbitration. And it is hereby declared that it is intended that this deed shall be registered under the 193rd section of The Bankruptcy Act, 1861. Provided always that if at the end of three months from the execution of these presents any of the said creditors shall not be paid 20s. in the pound, then, subject to any mortgage which may have been made by virtue hereof, the position of the unpaid creditors shall not in any way be prejudiced or affected by executing these presents." Averment. That the deed of the 14th *January*, 1867, was executed by the defendant more than three months after the date of the execution by the defendant of the deed of the 2nd *December*, 1865, and that divers of the costs, charges and expenses in the deed of the 14th *January*, 1867, recited to have been incurred were incurred, and the advances and payments therein recited to have been made were made, after the expiration of

three months after the date of the execution by the defendant of the deed of the 2nd *December*, 1865, and the same were respectively unpaid at the time of the execution by the defendant of the deed of the 14th *January*, 1867.

Demurrer, and joinder.

The case was argued and decided in the Queen's Bench at the sittings in banc after *Hilary* Term, *February* 12.

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Wednesday,
February 12th.

Quain (*A. Peel* with him), for the defendant.—The deed of the 14th *January*, 1867, set out in the replication, is a valid composition deed under The Bankruptcy Act, 1861, 24 & 25 *Vict.* c. 134. s. 192., though it provides for the payment in full of the costs of the arrangement under the deed of the 2nd *December*, 1865, and of the expenses of carrying on the colliery under inspection. Those expenses were incurred for the benefit of the estate and are in the nature of salvage, and it is reasonable that the trustees under the second deed should take subject to the expenses incurred for preserving the estate. [*Lush* J. The inspectors having paid those expenses were creditors for the amount.] But they could not have sued for them. Moreover, under the first deed they had an equitable mortgage or lien on all the property of the debtor for those expenses, as that deed gave them power to raise money on mortgage of the colliery for payment of the costs incident to the deed, including the expenses of carrying on the colliery. The deed in *Strick v. De Mattos* (a) contained a clause (5), p. 33, empowering the inspectors to require the debtor to obtain advances by way of mortgage or pledge

(a) 3 *H. & C.* 22.

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of any part of his estate for the purposes of the deed ; and the liability for these expenses may have been incurred within three months after the execution of the deed during which the licence was to continue ; but the power of the defendant to carry on the colliery under the inspectors was not necessarily determined at the end of that time. Further, it does not appear that there was any new creditor between the execution of the first and second deeds. In *Ex parte Somerville, in re Tresidder* (a), there had been an abortive deed, and Lord *Cranworth* held that a second deed, which directed the payment of the costs of the first as well as of the second, was valid. [*Blackburn J.* He rather puts it on the ground that *de minimis non curat æquitas*.] In *Spitzer v. Cheffers* (b) a deed of arrangement under stat. 12 & 13 *Vict. c.* 106. s. 224. contained a provision enabling the trustees to pay the costs in or about the negotiations and preparations for the arrangement, or any other negotiations, preparations, or matters in reference to the winding up of the estate of the debtor. *Erle C. J.* said, p. 716, " This, it is said, may relate to former abortive attempts at winding up the affairs of the debtor wholly disconnected with the present arrangement. But, construing the language of the deed *ut res magis valeat quam pereat*, it means costs and expenses incidental to the winding up the estate in connection with this present arrangement. If the preparations referred to eventuated in this deed, I think the trustees may well call that a preparation for the winding up." In *Strick v. De Mattos* (c) there was a clause (9) which provided for payment of the expences incurred in or relating to the suspension of pay-

(a) 35 *L. J. Bank.* 1 ; *L. R.* 1 *Chanc. App.* 21.

(b) 14 *C. B. N. S.* 686.

(c) 3 *H. & C.* 22. 35.

ment and of the deed and carrying the same into effect, and the Court, in answer to the objection that under that clause large sums might be expended, said, p. 57, "The question must be dealt with practically. We know that, whether by payment before the deed or otherwise, such sums as these are really paid out of the debtor's estate,—the expenses of his bankruptcy would be if he were bankrupt; and as to any extravagant or unreasonable payments, their being made and sanctioned by the inspectors would be a breach of trust which would be restrained either by their disallowance or by their prevention. On this question *Spitzer v. Chaffers* (a) is in point."

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Joseph Dixon, for the plaintiff.—The operation of the deed of the 2nd *December*, 1865, was limited to three months from its execution by the defendant, during which the defendant was allowed to carry on the colliery under the direction of the inspectors, and the charge if any created by it in favour of costs and expenses extended only to such as were incurred during that time. Any subsequently incurred became ordinary unsecured debts due from the defendant, and the deed of the 14th *January*, 1867, gives priority to those debts over the other debts of the defendant, which renders it void. At any rate the deed of the 2nd *December*, 1865, could not establish a lien as against involuntary creditors after that time. If it is only doubtful whether a claim can be enforced a clause authorising the compromise of a doubtful claim makes an unequal distribution of the effects comprised in the

(a) 14 C. B. N. S. 686.

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deed among the creditors. In *Thompson v. Knight* (a) a clause empowering the trustees to pay those creditors the amount of whose composition did not exceed 10*l.* in one sum at such time as they should think fit was held to render the deed invalid as not placing the creditors on an equal footing. The deed of the 14th *January*, 1867, empowers the inspectors to make arrangements with creditors holding any portion of the estate of the debtor by way of mortgage, pledge, or lien. [*Blackburn J.* The clause is confined to redeeming the estate or goods actually in pledge.] The costs of paying out the sheriff were not incurred on the responsibility of the inspectors but of the defendant; and the person who advanced those costs is a creditor for their amount. [*Quain.* The deed in *Strick v. De Mattos* (b) and in *Woods v. De Mattos* (c) contained a clause authorising arrangements or adjustments with creditors.] [He also cited *Coles v. Turner*, in error (d).] In *Ex parte Somerville, re Tresidder* (e) the two deeds were parts of the same transaction.

Quain was not called upon to reply.

BLACKBURN J. I think there is no real objection to the deed of the 14th *January*, 1867. The replication sets out both the deeds. By the first, made on the 2nd *December*, 1865, it having been resolved by the creditors of the defendant that the business should be carried

(a) 36 *L. J. Exch.* 30; *L. R.* 2 *Exch.* 42.

(b) 3 *H. & C.* 22. 27.

(c) 3 *H. & C.* 987.

(d) *H. & R.* 386.

(e) 35 *L. J. Bank.* 1; *L. R.* 1 *Chanc. App.* 21

on by him for three months under inspectorship for the benefit of the creditors, they granted to him during three months from the date of the deed licence to carry on his trade or business of a coal proprietor, and to work the mines or colliery and to sell the coals or minerals under the direction of the inspectors, and the defendant covenanted with the inspectors that he would to the best of his skill and ability manage and carry on the trade and work the colliery, and execute all such assurances as in the judgment of the inspectors should be necessary for the purpose of raising money upon the security of the colliery for carrying on and working the same. The effect of this is that the creditors bind themselves and the defendant also binds himself absolutely for three months; but there is nothing in the deed to express their meaning that at the end of the three months the business should necessarily stop, nor would that be reasonably within their contemplation. At the end of the three months they might consider and determine what should be done; and the deed reserves to the creditors and to the debtor their powers and rights then to withdraw from the arrangement. But it does not appear that any one intervened; the business was in fact carried on under the inspectors beyond the three months, and costs were incurred in so carrying it on. I am inclined to think that the clause in that deed providing for the payment of the costs of those presents and all costs incidental to carrying out the trusts thereof, and enabling the inspectors to retain or require payment of them out of the estate, makes these expenses, though incurred after three months from the date of the deed, an equitable charge on the estate, so that the inspectors would in equity have a lien on the property. But

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it is not necessary to decide this point; for it appears from the recital of these clauses in the subsequent deed that the creditors thought so. Then the second deed of the 14th *January*, 1867, is impugned on one ground only, viz., that the first trust for payment in full of "all costs, charges and expenses thereinbefore cited or referred to as having been incurred by the inspectors or with their sanction for the benefit of the estate"—that is, the costs incidental to the carrying out the trusts of the deed of 1865—is a preference which vitiates the deed. If the inspectors had an equitable lien on the property for those costs the trust would be only doing what the creditors were bound to do independently of any agreement by them to that effect. But if it was making a present to the inspectors of those costs, it would be beyond their powers. There is however an intermediate case: if there was plausible ground for the inspectors thinking that they had a lien which they might enforce in equity, the creditors might reasonably agree amongst themselves not to throw good money after bad, and, in order to prevent a suit in equity with the probability of being defeated in it, might resolve to settle the matter by paying all those costs in full. I think that the payment of a doubtful claim is not alien to the payment of the debts of the debtor and his release therefrom and the winding up of his estate within stat. 24 & 25 *Vict. c. 134. s. 192.*, and that the Legislature have given the majority of the creditors a right to settle such a claim. Therefore this clause is not *ultra vires*.

LUSH J. I am of opinion that the provision for making the costs and expenses incurred under the deed

of the 2nd *December*, 1865, a first charge does not invalidate the deed of the 14th *January*, 1867, as the terms of the first deed created an equitable lien on the estate of the defendant for them. I also agree with my brother *Blackburn* that if they did not they at least gave the inspectors a plausible ground for asserting that they had a lien on the estate for the expenses incurred in carrying on the business of the colliery, and consequently justified the creditors in paying them off. It is contended that the second deed cannot have effect for two reasons: first, because the powers of the inspectors under the first deed came to an end at the expiration of three months from its date; and it appears from the recital in the second deed that a considerable portion of the costs and expenses of carrying on the colliery must have been incurred after that time. But that is not the construction which I put upon that deed. As my brother *Blackburn* says, it binds all parties to carry on the business of the colliery for three months; after that time if profits were not realised so as to pay 20s. in the pound they were free, and stood with relation to each other as they were before. That does not incapacitate them from going on after three months. And I think it was competent for the creditors to bind themselves that if the colliery was carried on after that time the inspectors should be indemnified out of the estate as if the expenses had been incurred within the three months. The second objection is, that it does not appear that all the charges were incurred on the responsibility of the inspectors; but the contrary, because a part of them were in respect of paying out the sheriff by a sum borrowed from some other person. That however only removes the equity one

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step further; for the person who advanced the money intended, and it was the intention of the inspectors, that he should be indemnified out of the corpus of the estate, and therefore the creditors were justified in making provision for paying off that sum before the assets were distributed.

Our judgment therefore will be for the defendant.

Judgment for the defendant.

The plaintiff having brought error on this judgment, the case was argued on the 11th *May*; before KELLY C. B., BYLES, KEATING and SMITH JJ., BRAMWELL, CHANNELL and PIGOTT BB.

Gray (Joseph Dixon with him), for the plaintiff, cited *Redpath v. Wigg (a)*.

Quain (A. Peel with him), was not heard.

THE COURT unanimously affirmed the judgment, *Channell B.* referring to *Ex parte Tomlinson. In re Boyce (b)*.

Judgment affirmed.

(a) 4 H. & C. 432.

(b) 3 D. G. F. & J. 745.

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IN THE EXCHEQUER CHAMBER.

Tuesday,
February 4th.WOOD *against* BOOSEY and another.

1. The pianoforte score of an already existing opera, whether arranged by the composer himself or by another person, is the subject of copyright within stats. 5 & 6 *Vict. c. 45.* and 7 & 8 *Vict. c. 12.*

2. In registering the pianoforte score of an opera pursuant to stat. 7 & 8 *Vict. c. 12. s. 6.*, it is not correct to insert as the author of it the name of the composer of the opera.

Copyright
Acts,
5 & 6 *Vict.*
c. 45., 7 & 8
Vict. c. 12.
s. 6.
Musical com-
position.
Pianoforte
score of opera.

APPEAL from the decision of the Court of Queen's Bench discharging a rule to set aside a nonsuit and enter the verdict for the plaintiff. See 7 *B. & S.* 869.

The case was argued, on *February 3, 4*, before KELLY C. B., WILLES, KEATING and SMITH JJ. and BRAMWELL and CHANNELL BB., and judgment given on the latter day.

Parry Serjt. (Patchett and Popham Pike with him), for the plaintiff.—One of the grounds of nonsuit was that, the opera having been composed by *Otto Nicolai* and the piano score having been arranged by *Brissler* after *Nicolai's* death, the piano score ought in accordance with the requirements of stat. 5 & 6 *Vict. c. 45.* and 7 & 8 *Vict. c. 12.* to have been registered in the name of *Brissler* as author or composer, and not in the name of *Nicolai*. But *Brissler* was not the author of the pianoforte score either in fact or law. No evidence of experts was given at the trial to shew what the pianoforte score is, but it is not to be confounded with an arrangement for the pianoforte. It is a transcript of the whole opera : every note in the vocal part is *Nicolai's*, and *Nicolai* is the author of every air and melody played on the piano ; *Brissler* has only

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made the airs and melodies which are the essence of the music of the opera capable of being played on the piano. What he has done for *Bote & Bock*, the proprietors of the opera, is analogous to what *Hatton* did, who was employed by *Kean* to compose the music for the representation of *Shakespeare's* play of *Much Ado About Nothing* on the stage, and in *Hatton v. Kean* (a) it was held that the defendant was the author and designer of the entire dramatic representation or entertainment, including the music composed by the plaintiff, within stat. 3 & 4 *W. 4. c. 15. s. 2.*, extended to musical compositions by stat. 5 & 6 *Vict. c. 45. s. 20.* *Brissler* could not have made the pianoforte arrangement without the consent of the proprietors of the opera; *D'Almaine v. Boosey* (b). How can a pirate be the author of a work within the Copyright Acts? In *D'Almaine v. Boosey* Lord Abinger said, p. 802, "The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment." On the other hand an advanced proficient in music can play the airs and melodies of an opera on the piano from the opera score. Before stat. 3 & 4 *W. 4. c. 15.* the adaptation of a tragedy for dramatic representation was not actionable; *Murray v. Elliston* (c). [He also cited *Reade v. Conquest* (d) and *Tinsley v. Lacy* (e).]

KELLY C. B. We will not trouble you to argue the other points, as we consider this objection fatal.

Coleridge (*Roberton Blaine* with him), for the defendants, was not called upon.

(a) 7 C. B. N. S. 268.

(b) 1 Y. & C. Exch. 288.

(c) 5 B. & A. 657.

(d) 9 C. B. N. S. 755.

(e) 1 H. & M. 747. .

KELLY C. B. I must express my regret that we feel it our duty to affirm the judgment of the Court of Queen's Bench, for the merits of the case are with the plaintiff. He is the proprietor of this musical composition ; but it is not registered properly in respect of the name of the author or composer, even if it be so in respect of the name of the work itself. The case is simply this : *Nicolai* was the author of an opera *Die Lustigen Weiber von Windsor*, which was represented and probably published in *March*, 1849 ; he died two months after that period, and nearly two years afterwards his representatives, *Bote* and *Bock*, who had become the proprietors of the opera, employed *Brissler*, and I have no doubt paid him, to adapt the music of the opera to the pianoforte ; and he accordingly became the author of the work in question.

The question is, whether this action is maintainable. And that depends on whether the plaintiff, who claims as the assignee of *Bote* and *Bock*, has shewn himself to be the proprietor of the work in conformity with the provisions of the International Copyright Act, 7 & 8 Vict. c. 12. The work was assigned to him, and it was necessary that in compliance with sect. 6 he should state the following particulars in the Register Book of the Stationers' Company : the title of the book ; the name and place of abode of the author or composer ; the name and place of abode of the proprietor of the copyright ; and the time and place of first publication. On looking at a copy of the entry of *October* 4, 1851, we find under the heading " Title of book " "*Die Lustigen Weiber von Windsor. Komische Oper*, composed by *Otto Nicolai*. Pianoforte score." If that means the entire opera itself, it is not the work for the piracy of which this action is brought ; but if it means the pianoforte

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score or arrangement for the pianoforte of the opera it is correctly described. In the third column, in which the name and place of abode of the author or composer is entered, the author or composer of the work is described as *Otto Nicolai*, who died two years before the pianoforte score was brought into existence, the entry of the time of first publication being the 1st *September*, 1851. And the question is, whether this arrangement and the opera as originally composed are really one and the same work ; not whether the arrangement is a piracy of the original work. With reference to the judgment of Lord *Abinger* in *D'Almaine v. Boosey* (a) I have no hesitation in saying that if *Brissler* had published this arrangement for the pianoforte during *Nicolai*'s life without his authority, or since his death without the authority of his representatives *Bote* and *Beck*, he would have pirated the work, and *Nicolai* or his representatives might have maintained an action for the infringement of the copyright against him. But still the work of *Brissler* may be a new and substantive work and the subject of copyright in this country. What then is the nature of *Brissler*'s work ? The arrangement for the pianoforte and the original score are essentially different. The opera is composed and published in score for about twenty instruments, each line of what is called the entire score containing the music for one instrument. The arrangement for the pianoforte has portions which are identically those in the opera, and there may be a piracy of part of an air or opera as well as of the whole, as in *D'Almaine v. Boosey* (a). But the part for the piano, which is the pianoforte accompaniment in the two lower lines of the music, is independent of the melody in the upper line for the voice. No doubt the notes which form the melody will be found

(a) 1 Y. & C. Exch. Eq. 288.

somewhere in the score, but the notes of the pianoforte accompaniment may not. The accompaniment is a work of greater or less skill. In some cases the work of adaptation is little more than mechanical and what any one acquainted with the science of music might be able to do without difficulty. On the other hand it may be and often is, as in the case of the six operas of *Mozart* by *Mazzinghi* of which my brother *Bramwell* has reminded me, a work of great skill, I can hardly say genius. And if after the copyright in the original opera has expired a person composes an adaptation of that opera to the pianoforte, he is as much entitled to the copyright in it as the composer of the opera, and another person who pirated that arrangement would be liable to an action. That is an infallible test to shew that an original opera and the arrangement of it for the pianoforte are different works. It is clear also that there may be different arrangements each of which is a new and substantive work, and one might be a piracy of the other. In point of fact an adaptation or arrangement for the pianoforte of the music of an opera is a new and separate work. The result is that the name of the author or composer of the pianoforte score is not properly stated.

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WILLES J. concurred.

BRAMWELL B. I also am of opinion that the judgment must be affirmed. The plaintiff's title is not that of assignee of the copyright in the opera. That is not and could not be claimed, because it was not registered within twelve months after the first publication. He claims as proprietor of the pianoforte score of the opera,

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and his title is under the entry of the 4th *October*, 1851, which is a registry not of the opera but of the pianoforte score as it is called.

Now, an opera is written for voices and different instruments. In this pianoforte score the part for the voices is identically preserved. Such a score would be an infringement of the copyright in the opera. But in the adaptation of the music of the opera to the pianoforte the composer preserves the harmonies and, as far as he can, the notes and the effect of the original, but he cannot produce upon the pianoforte everything that the author wrote. It is a physical impossibility that fingers could play upon a pianoforte all the notes in the orchestral score. Judgment and choice are required in the composer. For example, in a tremolando, where the violins play the same notes backwards and forwards continually, which cannot be done on the pianoforte, the substitute is that an octave is played with the thumb and finger. Also there are prolonged notes in the one and not in the other; as the score of the opera is written for several instruments, which cannot all be represented on the piano, the arranger puts in an octave below on the piano to give as far as possible the same effect. It is clear therefore that what the person who arranges for the pianoforte does is something different from what the original composer has done. It is a very common expression to say, such a piece is well or ill arranged, —this is a difficult or an easy arrangement. The *German* arrangements are more difficult than the *English*, because the *German* composer, with laborious conscientiousness, endeavours to put into the arrangement every note which the composer has put into the score, whereas the *English* composer endeavours to make the arrange-

ment clear for the player. It is manifest therefore that judgment and taste are required on the part of the arranger for the pianoforte. And if a person should compose an opera without being able to play on the pianoforte he could not himself arrange it for the pianoforte. The person who arranges for the pianoforte must have a knowledge of the instrument: and it would be a bad arrangement if the passages did not lie well to the hand of the performer. If therefore instead of this musical composition being called a "pianoforte score" it had been called "an arrangement for the pianoforte and voices," it would have been manifest that *Nicolai* was not the author but *Brissler* was. It might indeed be prudent to state that *Nicolai* was the author of the opera and that *Brissler* arranged or adapted it to the pianoforte.

It has been said that there is nothing original on the part of the person who makes the arrangement. It is true that he neither invents the tune nor the harmony, but there is invention or rather composition in the arrangement of which he is the author. If another person arranged this opera for the pianoforte, or even if *Brissler* himself arranged it over again, he would do it differently, for there is no rule by which it is to be done in a particular way. It is clear therefore that there is something in the nature of authorship in *Brissler*, and consequently, his name not having been stated in the register as the author, the plaintiff has not a copyright of the pianoforte score, and consequently cannot complain of this infringement.

CHANNELL B., KEATING and SMITH JJ. concurred.

Judgment affirmed.

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WOOD

v.
BOOSEY.

1868.

*Saturday,
February 1st.*

OGLE *against* Earl VANE.

*Action for
non-delivery
of goods.
Delay by
request of
vendor.
Damages.
Statute of
Frauds,
29 Car. 2.
c. 3. s. 17.*

By bought and sold notes signed by brokers acting both for the plaintiff and the defendant, the last of which was dated *April* 25th, the plaintiff bought of the defendant 500 tons of iron, the delivery to extend over three months. None of the iron was delivered by the 25th *July*. A correspondence ensued between the brokers and the defendant's agent until *February* following, from which a jury might properly come to the conclusion that the plaintiff waited for the delivery of the iron at the request of the defendant; he then went into the market and bought, the price of iron being higher than at the end of *July*. Held that, as the plaintiff had not bound himself to wait, there was no alteration of the contract within the Statute of Frauds, 29 Car. 2. c. 3. s. 17., and therefore in an action for breach of contract he might recover from the defendant the difference between the contract price of the iron and the market price in *February*.

APPEAL against the decision of the Queen's Bench, reported, vol. 7, p. 855, which was heard before KELLY C. B., WILLES, KEATING and SMITH JJ., and CHANNELL B.

T. Jones (*C. Crompton* with him), argued for the defendant, citing *Brady v. Oastler* (a) and *Noble v. Ward on appeal* (b).

Holker, for the plaintiff, was not called on.

THE COURT unanimously affirmed the decision.

Judgment affirmed.

(a) 3 H. & C. 112.

(b) 36 L. J. Exch. 91; L. R. 2 Exch. 135.

1868.

MARTIN'S PATENT ANCHOR Company (Limited)
against MORTON.

Tuesday,
February 4th.

SAME *against* HEWITT.

Bankruptcy.
24 & 25 Vict.
c. 134.
Joint Stock
Company.
25 & 26 Vict.
c. 89.
Calls.
Assignees.

A person who had taken shares in a Company incorporated and registered under The Companies Act, 1862, 25 & 26 *Vict. c. 89.*, became bankrupt under The Bankruptcy Act, 1861, 24 & 25 *Vict. c. 134.* He however retained his shares, the assignees not having taken them, and the Company was subsequently wound up. Held, that he was not discharged from liability to calls made after his bankruptcy.

THESE cases were tried before *Blackburn J.* at the *Surrey* Summer Assizes, 1867. They were actions brought by the liquidators of a Company registered and incorporated under The Companies' Act, 1862, 25 & 26 *Vict. c. 89.* for calls on shares in the Company, which was being wound up under an order made for that purpose; to which the only plea in each case was that after the cause of action accrued the defendant became bankrupt. His assignees did not take the shares, but the bankrupt continued to hold them. In both cases the learned Judge directed a nonsuit to be entered, with leave to the plaintiffs to move to enter a verdict on the ground that the defendants were not discharged from liability by their respective bankruptcies.

Philbrick, in *Michaelmas* Term, having obtained rules accordingly, the cases were now argued and decided.

Brown shewed cause in the first case.—It may be conceded that under the Acts in force before The

1868. Bankruptcy Act, 1861, the liability to these calls would not be discharged by bankruptcy; *The South Staffordshire Railway Company v. Burnside* (a), *The General Discount Company (Limited) v. Stokes* (b). A new state of the law has however been introduced by "The Bankruptcy Act, 1861," 24 & 25 *Vict. c. 134.*, taken in connection with "The Companies Act, 1862," 25 & 26 *Vict. c. 89.* Sects. 150-154 of the former Act entitle a bankrupt to be discharged from various debts from which he otherwise would not be discharged. Sect. 153 enacts that "If any bankrupt shall at the time of adjudication be liable, by reason of any contract or promise, to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the Court acting in prosecution of such bankruptcy to direct such damages to be assessed by a jury, either before itself or in a Court of law, and to give all necessary directions for such purpose; and the amount of damage, when assessed, shall be proveable as if a debt due at the time of the bankruptcy: Provided that in case all necessary parties agree, the Court shall have power to assess such damages without the intervention of a jury or a reference to a Court of law." And, by sect. 154, "If any bankrupt shall at the time of adjudication be liable by reason of any contract or promise to pay premiums upon any policy of insurance, or any other sums of money, whether yearly or otherwise, or to repay to or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, if he think fit, apply to the Court to set a value upon his interest under such contract or promise, and the Court is hereby

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(a) 5 *Lack.* 129.

(b) 17 *C. B. N. S.* 765. 774.

required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon."

The latter Act, 25 & 26 *Vict. c. 89.*, provides for the effect of the articles of association; sects. 7, 16, 38: and enacts as follows:—Sect. 16. The articles of association when registered "shall bind the Company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act; and all monies payable by any member to the Company, in pursuance of the conditions and regulations of the Company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the Company, and in *England* and *Ireland* to be in the nature of a specialty debt." Sect. 75, "The liability of any person to contribute to the assets of a Company under this Act in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made." Sect. 76. "If any contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned, his personal representatives, heirs, and devisees shall be liable in a due course of

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administration to contribute to the assets of the Company in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly." Sect. 77. "If any contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his assignees shall be deemed to represent such bankrupt for all the purposes of the winding up, and shall be deemed to be contributories accordingly, and may be called upon to admit to proof against the estate of such bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any monies due from such bankrupt in respect of his liability to contribute to the assets of the Company being wound up; and for the purposes of this section any person who may have taken the benefit of any Act for the relief of Insolvent Debtors "before 11th October, 1861," shall be deemed to have been bankrupt."

Payment of calls is by sect. 16 in virtue of a statutable covenant to pay. As the Company can prove against the party's estate he has a quid pro quo, and they can protect themselves by introducing clauses into the articles of association. This construction is borne out by the language of the Court in *Ex parte Harding, in re Williams*, and *Ex parte Canwell, in re Vaughan (a)*, although those cases were decided on sect. 90 of stat. 24 & 25 Vict. c. 134., and therefore are not directly in point. [*Lush J.* Neither of those cases applies where the bankruptcy occurred prior to the winding up of the Company. *Blackburn J.* You must further shew that the liability is such as comes within sect. 154 of The Bankruptcy

(a) 33 L. J. Bank. 26, the first of which was afterwards reversed on appeal, 35 L. J. Bank. 25; L. R. (1 H. L.) 9.

Act, 1861, 24 & 25 *Vict. c.* 134. That section was drawn to meet the case of *Warburg v. Tucker* (*in error*) (a), and never meant anything so extremely unjust and inexpedient as that in an existing Company a shareholder should take the dividends and never pay any calls.]

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Montagu Chambers shewed cause in the second case.— It would be hard if the bankrupt were to have all the advantage if the Company prospers and none of the liability if it fails. But in stat. 25 & 26 *Vict. c.* 89. s. 77. the Legislature contemplated the case of an *insolvent* Company in which a party had become bankrupt *anterior* to its being wound up.

Philbrick, who appeared to support the rules in both cases, was not called on.

BLACKBURN J. The question raised in these cases is the same, and both rules must be discharged.

The first point turns on part iv. of stat. 25 & 26 *Vict. c.* 89., and principally on sects. 75, 76, 77. The statute, having defined a “contributory” to mean every person liable to contribute to the assets of a Company, provides by sect. 75 that that liability shall be deemed to create a debt “accruing due from such person at the time when his liability commenced,” the meaning of which is the point the House of Lords had to consider in *Williams v. Harding* (b), a case however which turned on whether a debt accruing after The Bankruptcy Act, 1861, 24 & 25 *Vict. c.* 134., came within the provisions of this section, and does not touch the present question. The section goes on to say it shall be lawful to prove against the

(a) *E. B. & E.* 914.(b) 35 *L. J. Bank.* 25; *L. R.* (1 *H. L.*) 9.

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estate of the contributory. Now I think that this does not simply apply to the case where a man becomes bankrupt after the winding up of the Company, a construction which would be narrower than the words, for though the bankruptcy were before the winding up it is still a pending bankruptcy, so that the man has no property of his own, but his assignees take his rights; and sect. 77 says that if a contributory becomes bankrupt his assignees shall be deemed to represent him. This construction also gives effect to the last words of sect. 77, which enact that for the purposes of that section any person who has taken the benefit of any Insolvent Debtors Act before the coming into operation of The Bankruptcy Act, 1861 (*a*), by which insolvency was abolished, shall be deemed to have become bankrupt. This does not apply here, for in both cases before us the adjudication of bankruptcy was before the winding up. It would be a monstrous injustice to hold that when a man was a shareholder at the time of the winding up of a Company he should not be liable to calls because at some time (possibly ten or eleven years before) he had been bankrupt, though the assignees would not take the shares.

The defendants in these cases therefore are not discharged by force of The Companies Act 1862, 25 & 26 Vict. c. 89., but the question remains, are they not discharged by force of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134.? Mr. *Brown* called our attention to sect. 16 of The Companies Act, 1862, which enacts that the articles of association when registered shall bind the Company and its members as if each member had subscribed his name and affixed his seal thereto and there

(*a*) See sect. 232 of that Act.

were in them a covenant for him "to conform to all the regulations contained in such articles," and he rightly argued that this is the same as if the man put his seal to a covenant that if the directors should make calls at any future time he would pay them. But then he went on to argue that as the defendant in each of the cases before us became bankrupt after he entered into this covenant, though he was entitled to all dividends on shares, yet by force of some enactment in The Bankruptcy Act, 1861, he became free from future calls. If the Legislature meant that, Mr. *Brown* would be right, but when we look at the Acts we find it is not so. The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106., contains a variety of sections on which similar questions had been raised, and the decided cases upon them are against Mr. *Brown's* view. But then comes The Bankrupt Act, 1861, 24 & 25 Vict. c. 134. s. 154., on which so far as I know there has been no express decision. [His Lordship read the section.] When we look at this section we see that it does not apply here. The liabilities there spoken of must be understood to mean liabilities ejusdem generis with contracts for the payment of premiums on policies of insurance, and cannot be analogous to calls like these. The Legislature might have said that a man shall be discharged from liability in respect of his shares under such circumstances; and it might be well if Companies were for the future to put some provision into their articles of association that if a shareholder becomes bankrupt and the assignees do not choose to take his shares the Company should have power to sell them, and a similar power on his part to compel the Company to take them. Perhaps the Legislature would do well to introduce an enactment to this effect; but

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1868. they have not done so, and there is no such provision
in the cases before us.

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MELLOB J. concurred.

LUSH J. I am of the same opinion. If we are to construe sects. 75, 76 and 77 of The Companies Act, 1862, properly, we must construe them as my brother *Blackburn* has done. Sect. 75 enacts, "The liability of any person to contribute to the assets of a Company under this Act in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability." So far nothing is said about bankruptcy, but the section continues: "And it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made." Now the argument of the defendants' counsel requires us to alter or repeal this by holding that this section operates notwithstanding his discharge, and that the assignees must prove against his estate. This would be to put the perfectly absurd construction on the enactment that the estimated value of his liability must be proved against a man who is become *sui juris* and against an estate already gone. Therefore the defendants cannot receive aid from this statute, and must have recourse to The Bankruptcy Act, 1851, 24 & 25 *Vict. c. 134.*, to discharge him from the payment of future calls. I agree with my brother *Blackburn* there is nothing to discharge him

from the payment of them. Sect. 16 of The Companies Act, 1862, puts him in a position to pay such calls as the directors may make, but they are due as a specialty debt. It has been determined by decided cases that nothing in The Bankrupt Law Consolidation Act, 1849, 12 & 13 *Vict. c. 106.*, would discharge him, and there is nothing here under sect. 154 of The Bankruptcy Act, 1861, to do so, which is confined to cases where the bankrupt is bound to make periodical payments, and does not apply to the holder of shares who is not bound to pay at any particular time or any given sum.

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Rules absolute.

MEMORANDA.

Frederic Baron Chelmsford resigned the Great Seal, which was delivered by Her Majesty to *Hugh Baron Cairns*, one of the Lords Justices of Appeal.

Sir *William Shee*, Knt., one of the Justices of this Court, died, and was succeeded by *James Hannen*, Esq., of the *Middle Temple*, who afterwards received the honour of Knighthood. Mr. Justice *Hannen* was previously raised to the degree of the coif, and gave rings with the motto "*Quærere verum.*"

Sir *Charles Jasper Selwyn*, Her Majesty's Solicitor General, was appointed to the office of Lord Justice of Appeal in the place of Sir *John Rolt*, who had resigned from ill health. He was succeeded by *William Baliol*

1868. *Brett, Esq., of Lincoln's Inn, one of Her Majesty's*
MEMORANDA. Counsel, who received the honour of Knighthood.

Mr. Serjeant *Simon* received a patent of precedence giving him rank next after *Thomas Kingdon Kingdon, Esq.,* one of her Majesty's Counsel.

William Wyllys Mackeson, Esq., of the Inner Temple ; Martin Archer Shee, Esq., of the Middle Temple ; John Clerk, Esq., of the Inner Temple ; John Archibald Russell, Esq., of Gray's Inn ; Edward Vaughan Richards, Esq., of the Inner Temple ; Edward Vaughan Kenealy, LL.D., of Gray's Inn ; William Housman Higgin, Esq., of the Middle Temple ; Henry Wyndham West, Esq., of the Inner Temple ; Henry Matthews, Esq., of Lincoln's Inn ; Alexander Staveley Hill, D.C.L., of the Inner Temple ; Horace Lloyd, Esq., of the Middle Temple ; James Fitzjames Stephen, Esq., of the Inner Temple ; John Holker, Esq., of Gray's Inn ; Clement Tudway Swanston, Esq., of Lincoln's Inn, and Robert Stuart, Esq., of Lincoln's Inn, were appointed of Her Majesty's Counsel learned in the law.

END OF HILARY VACATION.

CASES

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ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

EASTER TERM,

XXXI. VICTORIA.

The Judges who usually sat in Banc in this
Term were:

COCKBURN C. J.		LUSH J.
MELLOR J.		HANNEN J.

THOMPSON *against* DALLAS.Monday,
April 27th.

1. The distance at which the defendant resides from the plaintiff when the action is brought is not alone a ground for granting costs under The County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 5.

2. The plaintiff, who resided at *Edinburgh*, sued the defendant, who resided in *London*, for wine sold and delivered to him not to be dealt with in the way of his trade, and judgment was signed by default. The costs were less than if an action had been brought in the County Court. Application for costs refused.

*County Courts
Act, 1867,
30 & 31 Vict.
c. 142. s. 5.
Costs.
Distance of
plaintiff from
defendant.*

THIS was an application for a rule calling upon the
defendant to shew cause why the plaintiff should

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not have his costs under sect. 5 of The County Courts Act, 1867, 30 & 31 *Vict. c. 142*.

The action was brought by the plaintiff, a wine merchant at *Edinburgh*, for wine sold and delivered to the defendant, who resided in *London*, and judgment was signed by default for 8*l.* 13*s.* The wine was not to be dealt with by the defendant in the way of his trade, and therefore the plaintiff could not have proceeded in the County Court and have had judgment entered up by default under sect. 2. He had no means of proving his case without calling a witness from *Edinburgh*, and the cost of bringing that witness to *London* would have been more than 12*l.* The costs of the present action to the time of signing judgment were 3*l.* 7*s.*, a sum less than if the plaintiff had proved his case in the County Court. A similar application had been made at Chambers and was referred to the Court.

Stat. 30 & 31 *Vict. c. 142. s. 5.* "If in any action commenced after the passing of this Act in any of Her Majesty's superior Courts of record the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the Judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a Judge at Chambers shall by rule or order allow such costs."

Popham Pike, in support of the application.—Stat. 30 & 31 *Vict. c. 142. s. 83.* Schedule (C.) having repealed sect. 128 of stat. 9 & 10 *Vict. c. 95.*, the superior Courts have no longer concurrent jurisdiction with the County Courts where the plaintiff dwells more than twenty miles

from the defendant. And as there is no clause in the County Courts Acts providing for judgment by default except sect. 2 of stat. 30 & 31 *Vict. c. 142.*, which is not applicable to the present case, the costs of the present action were less than the defendant would have been subjected to if sued in the County Court. The additional costs of this application will be small.

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BLACKBURN J. There was a difference of opinion and practice on this point, which is a matter of discretion with the Court, and at the beginning of this Term I reported the matter to the Judges at *Serjeants' Inn*, who discussed it; and we came to the conclusion that the distance at which the plaintiff resides from the defendant when the action is brought is not alone a ground for granting costs under stat. 30 & 31 *Vict. c. 142. s. 5.* The Judges came to that conclusion for different reasons; but I believe that the Legislature intended that costs should not be granted unless there was some special reason; and the effect of granting them in such cases as the present would be to tempt plaintiffs to sue in the superior Courts for the chance of getting costs; and in the vast majority of cases there would be a great increase in the costs, by adding the costs of affidavits in support of and against the application, and of making the order. It is easy for parties who reside at a considerable distance from the place to which they send goods to retain written evidence of the order and of the delivery of the goods.

MELLOR and LUSH JJ. concurred.

Rule refused (a).

(a) See the next case.

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[Thursday,
January 28th,
1869.]

*County Courts
Act, 1867,
30 & 31 Vict.
c. 142. s. 5.
Costs.
Action which
cannot be
brought in
County Court.*

GREY *against* WEST and Wife.

1. *Quære*, whether sect. 5 of The County Courts Act, 1867, 30 & 31 Vict. c. 142., was intended to apply to actions which cannot be brought in a County Court?

2. If it was so intended the Court or a Judge has power under that section to allow the plaintiff in such actions his costs, though the sum recovered does not exceed 10*l.*, and the Judge declines to certify that there was sufficient reason for bringing the action in the superior Court.

THIS was an action for slander commenced in *October*, 1867, and tried at the Sittings for *Middlesex* after *Trinity* Term, 1868, before *Hannen J.*, when the plaintiff obtained a verdict for 10*l.* The learned Judge refused to certify, and, the Master having declined to tax the costs, the plaintiff applied to *Willes J.*, a Judge at Chambers, who referred the question to the Court.

The County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 5. "If in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of Record the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the Judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a Judge at Chambers shall by rule or order allow such costs."

In *Michaelmas* Term, 1868, *Anderson* obtained a rule calling upon the defendants to shew cause why the plaintiff should not be allowed her costs of this action, to be taxed by one of the Masters.

The rule was argued *Nov.* 16 ; before COCKBURN C. J.,
HANNEN and HAYES JJ.

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Francis shewed cause.—Sect. 5 of stat. 30 & 31 *Vict.* c. 142. uses the general words “in any action commenced after the passing of this Act,” and in order to discourage frivolous actions it operates to deprive the plaintiff of costs unless the Judge at the trial certifies that there was sufficient reason for bringing the action in the superior Court. In the present case, the Judge having refused to certify, this Court will not interfere with his discretion: the latter words of the section “or unless the Court or a Judge at Chambers shall by rule or order allow such costs” refer to cases in which there has been an omission to apply to the Judge at the trial for a certificate. [*Cockburn* C. J. The jury are the Judges of whether an action is frivolous, and by their verdict express their opinion on that point. In the present case, however, my brother *Hannen* says that the damages were excessive. *Hannen* J. I was asked to assist the plaintiff, and contrasting the witnesses on opposite sides I refused to do so. *Cockburn* C. J. Some light is thrown on sect. 5 by sect. 29, which enacts, “Where any action or suit shall be brought in any other Court than the superior Courts of law *which could have been brought in a County Court*,” and the verdict is for less than 10*l.*, only County Court costs are to be allowed unless the Judge certifies. In sect. 5 no distinction is made between the superior Courts and any other Court, such as the Court of Stannaries, the Passage Court at *Liverpool*, the Tolsey at *Bristol*: some words must *ex incuriâ* have been omitted in sect. 5.] The Court will not import words into sect. 5

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which deals with actions in the superior Courts, while sect. 29 provides for actions in other Courts.

Anderson, in support of the rule.—By sect. 34 of stat. 30 & 31 *Vict. c. 142.* that Act and the Acts specified in Schedule (D.), except such as are repealed, are to be construed together as one Act; and by stat. 9 & 10 *Vict. c. 95. s. 58.*, which is not repealed, an action of slander is excluded from the jurisdiction of the County Court. The object of sect. 5 of stat. 30 & 31 *Vict. c. 142.* was to drive into the County Court cases which might be disposed of there with more expedition and less expense than in the superior Courts; therefore it cannot apply to cases in which the County Courts have no jurisdiction. The general words “any action” would include ejectment. [*Hayes J.* That is not an action for damages.] Stat. 30 & 31 *Vict. c. 142.* is entitled “An Act to amend the Acts relating to the jurisdiction of the County Courts,” and it was not intended to alter the law as to the allowance of costs in actions in the superior Courts, or where the superior Courts and the County Courts had concurrent jurisdiction. [*Francis* referred to sects. 4 and 10. *Hayes J.* Sect. 10 shews that a defendant has under some circumstances the power of having the action tried in a County Court.]

Cur. adv. vult.

HAYES J. now delivered the judgment of the Court.

This was a case relating to the effect of the recent County Courts Act, 1867, 30 & 31 *Vict. c. 142.*, upon the costs of actions brought in the superior Court; but as this action was commenced after the passing of that Act,

and was tried after it had come into operation, the question stands clear of the provisions of the previous statutes, and depends entirely upon the construction of the 5th section of the recent Act. [His Lordship stated the facts.]

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The prominent point discussed in the case was that the plaintiff had no power of suing the defendant for this cause of action in the County Court, the 58th section of stat. 9 & 10 *Vict. c. 95.*, which excludes the County Court from original jurisdiction in slander, being still in force; and, although by the 10th section of the recent Act a defendant was enabled to apply under certain circumstances to have such an action remitted for trial to the County Court, no such application was made, and consequently the plaintiff was obliged to proceed to trial in the superior Court or abandon his action altogether.

Under the elaborate enactments of the previous County Courts Acts the liability of plaintiffs to the loss of costs for proceeding in the superior Courts was carefully confined to cases in which the County Courts had jurisdiction (see 9 & 10 *Vict. c. 95. s. 129.*, 13 & 14 *Vict. c. 61. ss. 11. 12. 13.*, and 15 & 16 *Vict. c. 54. s. 4.*). Indeed the very object and intention of such provisions hitherto has uniformly been to further the jurisdiction of the inferior Court by practically compelling plaintiffs to sue there for causes of action within its jurisdiction, and it is obviously quite beside the general object of a County Courts Act to subject plaintiffs to the loss of costs for suing in the superior Courts for causes of action which could not be sued for elsewhere.

What now gives rise to the question in this case is that all the former enactments above mentioned, which

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expressly preserved the plaintiff's right to costs in cases in which the County Courts had no jurisdiction, were repealed by sect. 33 of the recent Act, Schedule (C.) And in lieu of the repealed enactments the right to costs is now governed by the brief provision contained in the 5th section of the present Act, which is as follows. [His Lordship read it.] The general and comprehensive words of the earlier part of this section would certainly appear capable of embracing a case like the present, and it was contended on behalf of the defendant that they did so, and that, as the learned Judge at the trial had declined to certify under this section, the Court would not now review his decision. But it is to be observed that the jurisdiction given to the Judge at the trial and that given to the Court or a Judge at Chambers are separate and distinct. The Judge at the trial is empowered to certify on a single point, namely, whether there was sufficient reason for bringing the action in the superior Court; the power given to the Court or a Judge at Chambers is generally to allow the plaintiff his costs. The words relating to the certificate of the Judge at the trial are taken from those of the enactment previously in force on this point, which was contained in the 12th section of stat. 13 & 14 *Vict. c. 61.*, and it is clear that they were there intended to apply to those cases only in which the County Court had jurisdiction, but in which nevertheless it was reasonable that the plaintiff should sue in the superior Court. This is in effect the natural import of such a form of certificate, which is appropriate to express an option and reasonable election of the plaintiff to sue in the superior Court as contrasted with the County Court, but appears quite inappropriate to refer to a case in which the plaintiff had

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no option but was compelled to sue in the superior Court or not to sue at all. It appears to us that the certificate was intended to have the same meaning and application in the section now before us as a similar certificate had under stat. 13 & 14 *Vict. c. 61. s. 12.* And if this be so it seems to give rise to much doubt whether the 5th section of the present Act was really intended to have any application to cases in which the County Court had no jurisdiction. If however it was intended to apply to such cases, the general authority given to the Court or a Judge to allow the plaintiff his costs would at all events enable them to do so in cases of this nature where it appeared proper to make such allowance.

In making such allowance we should not be reviewing or interfering with the discretion exercised by the Judge at the trial in this case, who merely declined to give a certificate which was not properly applicable to it, but was only applicable to cases in which the County Court had jurisdiction. And as it is plain the Legislature intended that plaintiffs who had the power of suing in the County Court, but elected on reasonable grounds to sue in the superior Court, were to be allowed their costs, it seems impossible to suppose that it was intended that such allowance should not be made to plaintiffs who had no such election, and whose only remedy was in the superior Court. We think therefore that as in the present case the plaintiff has recovered an amount much beyond what would have entitled him to costs under the general law applicable to actions for slander in the superior Court, and as he could not have sued elsewhere he ought to be allowed his costs in this action, and therefore that the rule should be made absolute.

Rule absolute, with costs.

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Wednesday,
April 22nd.

The QUEEN *against* The Mayor, Aldermen and
Burgesses of the Borough of OLDHAM.

*Poor rate.
Municipal
Corporation
created since
5 & 6 W. 4.
c. 76.
Exemption
of corporate
property.
4 & 5 Vict.
c. 48. s. 1.
16 & 17 Vict.
c. 79. s. 2.
Union charge-
ability Act,
1865, 28 & 29
Vict. c. 79.*

Stat. 4 & 5 *Vict. c. 48. s. 1.*, enacted that the municipal corporations named in the Schedules (A.) and (B.) of stat. 5 & 6 *W. 4. c. 76.* should in some cases be rateable to the poor rate in respect of lands, tenements and hereditaments being their property and in their occupation: provided that where such property is in a parish wholly within a borough named in those Schedules, and the poor of which are relieved by one entire rate, the exemption shall continue as if the Act had not passed. Held,

1. That the exemption continued, though the law which induced the passing of the Act was altered by the decision of the House of Lords in *The Mersey Docks Cases*, 11 *H. L. C. 443.*

2. A corporation created since stat. 5 & 6 *W. 4. c. 76.* is by stat. 16 & 17 *Vict. c. 79. s. 2.* entitled to the exemption in stat. 4 & 5 *Vict. c. 48. s. 1.*

3. The Union Chargeability Act, 1865, 28 & 29 *Vict. c. 79.*, does not affect the exemption.

UPON appeal to the Quarter Sessions of the county of *Lancaster*, against a poor rate for the township of *Oldham*, in which the appellants were rated in respect of certain property occupied by them, the Sessions confirmed the rate subject to a case.

A charter of incorporation was granted to the borough of *Oldham* in 1849, under the provisions of stat. 5 & 6 *W. 4. c. 76.*, and confirmed by stat. 13 & 14 *Vict. c. 42. s. 1.* that charter was confirmed.

The borough of *Oldham* is co-extensive with and includes the whole of the township of *Oldham*. Before the passing of The Union Chargeability Act, 1865, 28 & 29 *Vict. c. 79.*, one entire rate for the relief of the poor of the township of *Oldham* was made and levied upon the rateable property therein, but inclusive of all the property the subject of this case.

The township now contributes to the relief of the poor as one of eight townships forming the *Oldham* Union according to the rateable value of the property comprised therein to a common fund for the relief and maintenance of the poor, whether in or out of the work-house of such Union, pursuant to the provisions of the last mentioned Act.

The Corporation of *Oldham* were possessed of and the occupiers of the property set forth in the above mentioned rate. The property was wholly situate within the borough and township of *Oldham*, and consisted of waterworks and mains, gasworks, meters and mains, police stations, telegraph, baths and washhouses, town-yard, fire-engine houses, town-hall, market-house, cemetery and other property, and had not heretofore been rated to the relief of the poor.

The borough of *Oldham* is a borough coming within the proviso of stat. 4 & 5 *Vict. c. 48. s. 1.* As the property lies in a township which is situate wholly within the boundaries of the borough, in which the poor within the boundaries thereof as existing for municipal purposes were up to the passing of that Act relieved by one entire poor rate, the Corporation claimed to have their property still exempted from the rate levied for the relief of the poor by virtue of the proviso in the same Act, and notwithstanding stat. 28 & 29 *Vict. c. 79.*

It was taken for the purposes of the case that the occupation of the before mentioned property of the Corporation which was liable to be rated under stat. 43 *Eliz. c. 2. s. 1.* was an occupation yielding a net annual value or clear rent over and above the probable average annual cost of repairs, insurances and other

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expenses necessary to maintain the property in a state to command such rent, and also that it was occupied and used for municipal purposes.

The question for the opinion of the Court was, whether the appellants were liable to be rated for the relief of the poor in respect of the property comprised in the rate.

Stat. 4 & 5 *Vict.* c. 48. s. 1., after reciting that “the municipal corporations of cities and boroughs named in the Schedules (A.) and (B.) annexed to” stat. 5 & 6 *W.* 4. c. 76. “have been held not to be liable by law to be rated to the relief of the poor in respect of any lands, tenements, and hereditaments being the properties and in the occupation of such municipal corporations, by reason that the income arising therefrom is applicable to public purposes only;” and that “it is expedient that such municipal corporations should nevertheless in some cases be rateable and be rated to the relief of the poor in respect of such property;” enacts, “That the said municipal corporations named in the said Schedules shall, from and after the passing of this Act, be rateable and be rated to the relief of the poor in respect of lands, tenements, and hereditaments being the property and in the occupation of such municipal corporations, as if such lands, tenements and hereditaments were not corporate property, any law, usage, or custom to the contrary notwithstanding: Provided always, that where such property lies in any parish which is situate wholly within the boundaries and limits of a city or borough named in the said Schedules, and in which city or borough the poor are relieved by one entire poor rate,

or in which city or borough the poor within the boundaries or limits thereof as existing for municipal purposes at the time of passing the said Act were then relieved by one entire poor rate, the exemption of such property from rateability shall continue as if this Act had not passed."

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The Municipal Corporation Act, 1853, 16 & 17 *Vict. c. 79.*, after reciting that *stats. 6 & 7 W. 4. cc. 104. 105.*, 7 *W. 4 & 1 Vict. c. 78.*, 2 & 3 *Vict. c. 28.*, 3 & 4 *Vict. c. 28.*, 4 & 5 *Vict. c. 48.* and 6 & 7 *Vict. c. 89.*, or some of the provisions thereof respectively which might properly be made applicable as well to all the municipal corporations in *England* which have been erected since the passing of *stat. 5 & 6 W. 4. c. 76.* as to the municipal corporations specified in the Schedules to that Act, do not apply to such recently erected municipal corporations by reason of those Acts or provisions being restricted in terms to the municipal corporations specified in those Schedules, and that it is expedient that all Acts relating generally to the municipal corporations in *England* specified in those Schedules should apply as well to all municipal corporations in *England* erected after the passing of that Act, enacts by *sect. 2* that "In every case in which an existing or future Act, passed after" *stat. 5 & 6 W. 4. c. 76.* "or any provision of any such Act, applies generally to the municipal corporations specified in the Schedules to that Act, or applies generally to municipal corporations in *England*, every such Act and every such provision shall (except only so far as by any Act hereafter passed is otherwise expressly provided) extend and apply, not only to every municipal corporation in *England* specified in those

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Schedules, but also to every municipal corporation in England erected after the passing of" stat. 5 & 6 W. 4. c. 76., "and whether erected by charter under that Act or otherwise."

By The Union Chargeability Act, 1865, 28 & 29 Vict. c. 79. s. 1., so much of the 26th section of stat. 4 & 5 Vict. c. 76. as requires that each of the parishes in a union formed under the authority of that Act shall be separately chargeable with and liable to defray the expense of its own poor, whether relieved in or out of the workhouse of such union, is repealed, and all the cost of the relief to the poor, &c., shall be charged to the common fund of the union.

F. M. White, in support of the rate.—First. It is contended by the appellants that the proviso in stat. 4 & 5 Vict. c. 48. s. 1. establishes a statutory exemption of this property, notwithstanding the decision in *The Mersey Docks and Harbour Board Trustees v. Cameron*, and *Jones v. The Mersey Docks and Harbour Board Trustees* (a), but the proviso only continues the existing law as to that description of property "as if this Act had not passed." The Act is not an exempting Act, but was passed to correct a state of the law which in the opinion of the Legislature was inexpedient; and, the enactment itself falling to the ground by the decision in *The Mersey Docks Cases*, the proviso falls with it. [*Mellor J.* In *The Mersey Docks Cases*, p. 475, *Blackburn J.* observes that *Crompton J.*, though he had always thought the decision in *Reg. v. The Mayor &c. of Liverpool* (b) wrong, "was the more unwilling to act in direct contradic-

(a) 11 H. L. C. 443.

(b) 9 A. & E. 435.

tion to that case, because the Legislature, in 4 & 5 *Vict.* c. 48., when enacting that the decision should no longer be practically operative, did not express any disapprobation of the principle of the decision, but rather used language seeming to assume that it was good law.” [Hannen J. Though the enacting part tends to correct the state of the law as to some corporate property, it is also an expression of opinion of the Legislature that other corporate property should not be rated.]

Secondly. The borough of *Oldham* is not within the proviso, not being named in Schedules (A.) or (B.) of stat. 5 & 6 *W.* 4. c. 76., though incorporated since by charter granted in pursuance of sect. 141, amended by stat. 7 *W.* 4 & 1 *Vict.* c. 78. s. 49., which charter was confirmed by stat. 13 & 14 *Vict.* c. 42. s. 1.

Thirdly. The Union Chargeability Act, 1865, 28 & 29 *Vict.* c. 79. s. 1., which enlarges the area of rating from the parish to the Union, takes away the reason of the exemption: the Union is a larger area than the borough. The words of the proviso to stat. 4 & 5 *Vict.* c. 48. s. 1. are, “in which city or borough the poor are relieved by one entire poor rate,” not “out of one entire poor rate.”

Quain, Kemplay and Edwards, contra.—As to the second point. The statement in the case that “the borough of *Oldham* is a borough coming within the proviso of stat. 4 & 5 *Vict.* c. 48. s. 1.” is correct, for stat. 16 & 17 *Vict.* c. 79. s. 2. extends the provisions of former Acts to municipal corporations created since stat. 5 & 6 *W.* 4. c. 76., and thus brings the borough within the proviso to stat. 4 & 5 *Vict.* c. 48. s. 1.

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1868. **MELLOR J.** I am of opinion that this property is
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 OLDHAM. exempt from rateability, and that the order of Scssions
 was wrong. The case is instructive as to the mode in
 which the course of legislation proceeds. We have first
 stat. 4 & 5 *Vict. c. 48.*, which was founded on decisions
 of this Court that the property of municipal corporations
 occupied by them for municipal purposes was not rate-
 able. There was no appeal from those decisions, and it
 was supposed that the state of the law was effectually
 declared. The Legislature, thinking it politic that in
 some cases such property should not be exempt, enacted
 that for the future municipal property in general should
 be rated, but deemed it politic that the exemption of
 corporate property under certain circumstances should
 continue. The property in question is so situated. It
 is said that, the law recited in the preamble to stat.
 4 & 5 *Vict. c. 48.* having been erroneously declared, the
 proviso was inserted under a misapprehension of the law.
 But though that may be so, and though probably this
 Act of Parliament would never have passed if the deci-
 sion of the House of Lords in *The Mersey Docks Cases (a)*
 had then been given, the Legislature have declared this
 exemption and we cannot disregard it.

Then the proviso in stat. 4 & 5 *Vict. c. 68. s. 1.* is
 limited to boroughs named in Schedules (A.) and (B.)
 to stat. 5 & 6 *W. 4. c. 76.*, and the borough of *Oldham*
 is not named in either of them; and if that state of
 things had continued this borough would have a different
 position from other municipal corporations, which would
 have been an anomaly; but that is cured by stat. 16
 & 17 *Vict. c. 79. s. 2.*

(a) 11 *H. L. C. 445.*

As to the last objection, stat. 28 & 29 *Vict. c. 79.* does not touch the question: it was not intended to impose a burden on property not previously rateable; the only effect of it is that the sum to be raised for the relief of the poor is estimated by the guardians instead of the overseers, and is raised by a rate extending over the whole Union, which forms one common fund, out of which the poor of other townships in the Union as well as the poor of *Oldham* are supported.

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LUSH J. As to the first point. The proper construction of stat. 4 & 5 *Vict. c. 28. s. 1.* is, that the proviso declares the intention of Parliament that corporate property situate in a parish wholly within the boundaries of a borough should continue exempt from rateability to the poor rate. And the reason is obvious; for whatever money was paid in respect of this property as poor rate would be repaid to the corporation in the shape of a borough rate levied on all the property in the parish, which comes to the same thing. The proviso may be read thus: "The exemption of such property from rateability shall continue, as we have before said has been declared, and as if this Act had not passed."

On the other points also I concur.

HANNEN J. concurred.

Order of Sessions quashed.

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which deals with actions in the superior Courts, while sect. 29 provides for actions in other Courts.

Anderson, in support of the rule.—By sect. 34 of stat. 30 & 31 *Vict. c. 142.* that Act and the Acts specified in Schedule (D.), except such as are repealed, are to be construed together as one Act; and by stat. 9 & 10 *Vict. c. 95. s. 58.*, which is not repealed, an action of slander is excluded from the jurisdiction of the County Court. The object of sect. 5 of stat. 30 & 31 *Vict. c. 142.* was to drive into the County Court cases which might be disposed of there with more expedition and less expense than in the superior Courts; therefore it cannot apply to cases in which the County Courts have no jurisdiction. The general words “any action” would include ejectment. [*Hayes J.* That is not an action for damages.] Stat. 30 & 31 *Vict. c. 142.* is entitled “An Act to amend the Acts relating to the jurisdiction of the County Courts,” and it was not intended to alter the law as to the allowance of costs in actions in the superior Courts, or where the superior Courts and the County Courts had concurrent jurisdiction. [*Francis* referred to sects. 4 and 10. *Hayes J.* Sect. 10 shews that a defendant has under some circumstances the power of having the action tried in a County Court.]

Cur. adv. vult.

HAYES J. now delivered the judgment of the Court.

This was a case relating to the effect of the recent County Courts Act, 1867, 30 & 31 *Vict. c. 142.*, upon the costs of actions brought in the superior Court; but as this action was commenced after the passing of that Act,

and was tried after it had come into operation, the question stands clear of the provisions of the previous statutes, and depends entirely upon the construction of the 5th section of the recent Act. [His Lordship stated the facts.]

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The prominent point discussed in the case was that the plaintiff had no power of suing the defendant for this cause of action in the County Court, the 58th section of stat. 9 & 10 *Vict. c. 95.*, which excludes the County Court from original jurisdiction in slander, being still in force; and, although by the 10th section of the recent Act a defendant was enabled to apply under certain circumstances to have such an action remitted for trial to the County Court, no such application was made, and consequently the plaintiff was obliged to proceed to trial in the superior Court or abandon his action altogether.

Under the elaborate enactments of the previous County Courts Acts the liability of plaintiffs to the loss of costs for proceeding in the superior Courts was carefully confined to cases in which the County Courts had jurisdiction (see 9 & 10 *Vict. c. 95. s. 129.*, 13 & 14 *Vict. c. 61. ss. 11. 12. 13.*, and 15 & 16 *Vict. c. 54. s. 4.*). Indeed the very object and intention of such provisions hitherto has uniformly been to further the jurisdiction of the inferior Court by practically compelling plaintiffs to sue there for causes of action within its jurisdiction, and it is obviously quite beside the general object of a County Courts Act to subject plaintiffs to the loss of costs for suing in the superior Courts for causes of action which could not be sued for elsewhere.

What now gives rise to the question in this case is that all the former enactments above mentioned, which

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expressly preserved the plaintiff's right to costs in cases in which the County Courts had no jurisdiction, were repealed by sect. 33 of the recent Act, Schedule (C.) And in lieu of the repealed enactments the right to costs is now governed by the brief provision contained in the 5th section of the present Act, which is as follows. [His Lordship read it.] The general and comprehensive words of the earlier part of this section would certainly appear capable of embracing a case like the present, and it was contended on behalf of the defendant that they did so, and that, as the learned Judge at the trial had declined to certify under this section, the Court would not now review his decision. But it is to be observed that the jurisdiction given to the Judge at the trial and that given to the Court or a Judge at Chambers are separate and distinct. The Judge at the trial is empowered to certify on a single point, namely, whether there was sufficient reason for bringing the action in the superior Court; the power given to the Court or a Judge at Chambers is generally to allow the plaintiff his costs. The words relating to the certificate of the Judge at the trial are taken from those of the enactment previously in force on this point, which was contained in the 12th section of stat. 13 & 14 *Vict. c. 61.*, and it is clear that they were there intended to apply to those cases only in which the County Court had jurisdiction, but in which nevertheless it was reasonable that the plaintiff should sue in the superior Court. This is in effect the natural import of such a form of certificate, which is appropriate to express an option and reasonable election of the plaintiff to sue in the superior Court as contrasted with the County Court, but appears quite inappropriate to refer to a case in which the plaintiff had

no option but was compelled to sue in the superior Court or not to sue at all. It appears to us that the certificate was intended to have the same meaning and application in the section now before us as a similar certificate had under stat. 13 & 14 *Vict. c. 61. s. 12*. And if this be so it seems to give rise to much doubt whether the 5th section of the present Act was really intended to have any application to cases in which the County Court had no jurisdiction. If however it was intended to apply to such cases, the general authority given to the Court or a Judge to allow the plaintiff his costs would at all events enable them to do so in cases of this nature where it appeared proper to make such allowance.

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In making such allowance we should not be reviewing or interfering with the discretion exercised by the Judge at the trial in this case, who merely declined to give a certificate which was not properly applicable to it, but was only applicable to cases in which the County Court had jurisdiction. And as it is plain the Legislature intended that plaintiffs who had the power of suing in the County Court, but elected on reasonable grounds to sue in the superior Court, were to be allowed their costs, it seems impossible to suppose that it was intended that such allowance should not be made to plaintiffs who had no such election, and whose only remedy was in the superior Court. We think therefore that as in the present case the plaintiff has recovered an amount much beyond what would have entitled him to costs under the general law applicable to actions for slander in the superior Court, and as he could not have sued elsewhere he ought to be allowed his costs in this action, and therefore that the rule should be made absolute.

Rule absolute, with costs.

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have not merely an easement but occupation of the land by means of their walls, sluices, flood-gates, pipes and other works connected with the watercourse.

Secondly. The watercourse is not exempt by reason of its being accessory to the lead mine. In *Rex v. Cunningham (a)*, iron and coal mines being conjointly rated, the rate was quashed on the ground that iron mines were not rateable; Lord *Ellenborough* observing with respect to the coal mines, p. 479, that "it could make no difference whether the coal were sold by the owner to another who used it in an iron foundry, or whether he applied it himself to the like purpose." In *Rex v. The Overseers of Bilston (b)* the engine and engine pit were as much part of the mine as if they had been underground. Suppose the owners of a lead mine made a tramway for conveying goods to and ore from the mine; it would be rateable though the value of it arose from the use of it in connection with the mine.

Thirdly. As to the amount at which the appellants are assessed. In consequence of the diversion of the water from the old watercourse the rateable value of the mill house and the land attached to it is reduced, and therefore the rateable value of the land covered by the new watercourse should be proportionally increased. The water is not exclusively used for working the mine, but partly for crushing, washing and cleansing the ore, in respect of which operation there is no speculation. A watercourse diverted for the purposes of irrigation would be considered as enhancing the rateable value of the land which it covered. Suppose the owner of a lead mine rented or built houses for the residence of a manager and workmen, those houses would be rateable though the mine was wholly unproductive.

(a) 5 East 478.

(b) 5 B. & C. 851.

Mellish (*McIntyre* with him), *contra*.—First. This stream when diverted has the incidents of a natural watercourse as regards the adjoining owners. In *Rex v. The Overseers of the West Middlesex Waterworks* (a) the water was conveyed by pipes: here part of the watercourse is open, and so far the Company have not exclusive occupation of it.

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Secondly. In *Rex v. The Overseers of Bilston* (b) *Holroyd J.* said, p. 854, that the engine, being profitable to the land only from being used for the purpose of working the mine, was not rateable. [*Blackburn J.* Is that consistent with later decisions?] It is doubtful whether the supposed tramroad to the mine would be rateable: if it were, every occupation road on a farm would be rateable. [*Watkin Williams* referred to *Rex v. Bell* (c). *Blackburn J.* That was the case of wayleaves for carrying coals from coal mines, so that the distinction, if there is one, could not be raised there.]

Thirdly. The assessment committee have taken the 100*l.* paid to the landlord of the mill, which is the value of the water, as the rateable value of the land covered by the water, whereas the total amount paid to all the occupiers of the land over which the water flows is 7*l.* 7*s.* The crushing, washing and cleansing the ore is part of the working of the mine.

Watkin Williams, in reply.—As to the rateable value, it is not the value of the land in the occupation of the Company. Great expense has been incurred by them in constructing culverts and other works. The water flowing over the land is part of the land for rating purposes.

(a) 1 *E. & E.* 716.(b) 5 *B. & C.* 851.(c) 7 *T. R.* 598.

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COCKBURN C. J. The only difficulty is in determining what is the real question submitted to us. If the question intended to be raised was as to the rateability of this watercourse because it is accessory to the working of a lead mine, the answer is, that although the mine is not rateable, nor according to *Rex v. The Overseers of Bilston* (a) a piece of machinery erected for the purpose of working it, we are here dealing with a watercourse of considerable length, and the value of the land over which it passes is enhanced by the watercourse and its capability of conveying water to the mine, and therefore the land plus the water is rateable. On the other hand, if it was intended to rate the Company for the 100*l.* which is paid annually not for the land covered by water but for the right to divert the water from the mill, that would not be the subject of a rate. In the latter case the 100*l.* is compensation for the diversion of the water, not rent paid for the occupation of the land covered with water, and as such is not rateable.

As to the rateable value. The value of the land is increased by the buildings or works erected on it, and by the water brought over it. Suppose, instead of the present state of things, the Company had not the occupation either of the land or the works constructed for the watercourse, and they wanted the water, they would have to pay so much rent to the proprietor of the land for the use of the watercourse and the works accessory to it, and that rent would be the rateable value of the land covered by the water. Assuming the rate is made on that basis it would be right, and there is nothing in the case to negative that. It is true the assessment committee fixed the rateable value at 100*l.*, the exact sum paid by way of compensation for the diversion of the

(a) 5 B. & C. 851.

water; but, looking at the extent of the land occupied and the works, it may be that 100% is the fair value of the occupation to the Company.

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BLACKBURN J. The main question is one of fact, are the Company in occupation of the watercourse, and the pipes and bricks used for carrying the water over the land? If they have the exclusive possession of them they are properly rated, if they have merely an easement they are not rateable. As to the pipes there is no distinction between this case and those of gas and water Companies: and as to the open watercourse, the works constructed on it tend to shew that the Company are occupiers of it also. But if that part were struck out it would not be material to the rate; for the enhanced value of the land by reason of its bringing water to the mine is the same whether the distance of the watercourse is a mile or less.

Then as to the rateable value. Inasmuch as the water is carried to the mine for the purpose of working it, and being a lead mine it is not rateable (not that it is exempted from rateability, but it has been held inveterately that stat. 43 *El. c. 2.* does not impose the poor rate on mines other than coal mines), therefore it is said that any increased value in the occupation of the land by reason that it brings the water to the mine is not to be taken into account. In *Rex v. The Overseers of Bilston* (a) it was decided that, the mine in that case not being rateable, an engine used for the purpose of drawing water from it was not rateable either. There was however nothing to shew that the engine occupied land: if it did I should hesitate in agreeing to that

(a) 5 B. & C. 851.

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decision. In the present case the watercourse cannot be said to be part of the mine. Its value is enhanced by its affording facility for conveying water to the mine and the works attached to it, and we have to consider what would be the rent which might reasonably be expected from a tenant from year to year. If the watercourse were in the possession of another person, and he bargained with the Company, the rent they would pay for it would be independent of the value of the water itself. Various elements would enter into consideration in settling the amount, which were called by the late *Sir Robert Peel* the higgling of the market; as for instance whether any other watercourse could be got cheaper. Possibly the Company could get land by itself much cheaper, but the additional cost of culverts and other works must be taken into account. Therefore a man would rather pay a higher rent for an existing watercourse than the abstract value for the land and water. In the present case the question asked is, whether the Company is rateable to the amount of the agricultural value of the land or to the amount of its enhanced value by reason of its being converted into a watercourse and applied to the purposes of working the mine. For the reasons I have mentioned it is rateable to the amount of its enhanced value independent of the value of the water. It is not indeed quite clear on what principle the assessment committee proceeded: it may be that they have rated it according to the sum paid for the diversion of the water. If so they were wrong. But if, applying the principle just mentioned, they thought 100*l.* was as near the annual value as they could approach it, and no person can estimate it closely, they were right.

Judgment for the respondents.

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Wednesday,
April 22nd.

Appeal against a poor rate for the parish of *H.* in respect of lands in the township of *T.*, on the ground that *T.* was part of the parish of *K.* A case was stated with power to the Court to draw inferences of fact. *H.* and *K.* are ancient immemorial parishes. *H.* consists, independently of *T.*, of the townships of *A.* and *H.*, the former maintaining its own poor and highways separately and having its own overseers and surveyors. The churchwardens and overseers of *H.* make poor rates for the remainder of the parish, which are called rates for the township of *H.*, but have for a considerable time included the lands of *T.* The district of *T.*, which is adjacent to *H.* and *K.*, has commonly been called a township or hamlet, but has not maintained its own poor or highways separately, nor appointed a constable for 100 years, and for anything that appeared to the contrary before that time the lands in *T.* had been rated to the poor and highway rates for *H.*, exclusive of *A.*, and the overseers and surveyors of highways for *H.* had acted for *T.* as if it were part of their district. On the other hand, the lands in *T.* from the earliest period were tithable to *K.* as being situate in that parish, and the occupiers were always rated to and paid church rates, and the *Easter* and all other ecclesiastical dues to *K.* As to all ecclesiastical matters *T.* had been uniformly and immemorially treated and reputed as part of the parish of *K.* *H.*, *A.* and *K.* are mentioned in *Domesday Book*; *T.* is not. Stat. 32 G. 3. c. 109., for inclosing open fields and commons "within the townships of *H.*, *A.* and *T.*," which lay intermixed and dispersed, reciting, among other things, that the lord of "the manor of *H.* and *T.*" was seised of the soil of the commons "within the said manor," empowered the Commissioners for putting the Act into execution to determine the boundaries of those townships and of the parishes adjoining. By their award all the rated lands in *T.* were dealt with and declared to be in the township of *T.* and parish of *K.* Held, notwithstanding the Inclosure Act and award, that *T.*, not being a township of itself, its association with *H.* for civil purposes, though for ecclesiastical purposes it was part of *K.*, might have a legal origin; and therefore the usage ought not to be disturbed.

Poor rate.
District part
of one parish
for ecclesiastical
purposes
and of another
for civil purposes.

UPON appeal to the Quarter Sessions for the East Riding of *Yorkshire* against a poor rate for the parish of *Hessle*, made on the 1st *September*, 1865, in conformity with the valuation list then in force, the Sessions confirmed the rate subject to a case, which was settled pursuant to a rule of Court, whereby the parties were to be at liberty to give fresh evidence and the Court to draw inferences of fact. The churchwardens

1868. and overseers of *Hessle* and four occupiers of lands in
 The QUEEN that parish, viz., *Barkworth*, *Ringrose*, *Thompson* and
 v. *Clark*, were respondents.
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In the rate appealed against the appellant and respondents were rated for and in respect of lands in their occupation situate in the township or hamlet of *Tranby*; and the question raised on the appeal was, whether they were liable to be rated in respect of their occupation of so much of the property therein rated as was locally situate in that township or hamlet, it being contended on behalf of the appellant that they were not legally liable to be rated to or in respect of such property in the parish of *Hessle* but in the adjacent parish of *Kirk Ella*, in the East Riding, of which it was contended that *Tranby* formed a part.

The parishes of *Hessle* and *Kirk Ella* are both ancient immemorial parishes. *Hessle* consists, independently of the disputed district of *Tranby*, of the township of *Anlaby* and the township of *Hessle*, the former of which maintains its own poor and highways separately and has its own overseers and surveyors. The churchwardens and overseers of *Hessle* make poor rates for the remainder of the parish, and which rates (like the present rate) are commonly called rates for the "Township of *Hessle*," but which rates for a considerable time past have included the lands of *Tranby*.

The district of *Tranby* has commonly been called a township or hamlet, but it has not maintained its own poor or highways separately nor appointed a constable. It consists of a considerable tract of agricultural land having on it three or four gentlemen's residences, one of which has a lodge and farm house attached to it. It lies adjacent to *Hessle* and also to *Kirk Ella*, but the

residences in *Tranby*, with one exception, are nearer to the parish church of *Hessle* than that of *Kirk Ella*.

For about the last 100 years, and for anything that appears to the contrary before that time, the lands in *Tranby* have been rated to the relief of the poor of *Hessle* (exclusive of the township of *Anlaby*), and the overseers of that part of *Hessle* parish have acted for *Tranby* as if it were a part of their district.

The earliest rate of which there is evidence is that of the year 1765, and in that and the six succeeding years the ratepayers of *Tranby*, though included in the *Hessle* rates, are inserted in a list by themselves, headed "*Tranby* tenants," and ending with a summary of the amount under the head "*Total Tranby Assessments*;" this practice however was not continued after 1772, but all the persons rated both in *Hessle* and *Tranby* are included in one general list.

The *Tranby* lands have also as far back as the memory of living witnesses extends, and for anything that appears to the contrary beyond that time, been rated to the highway rates for *Hessle* (exclusive of *Anlaby*), and the *Hessle* surveyors of highways repaired the roads of *Tranby* as if it were a part of their district. The county rate also, which was made upon or in respect of *Hessle* (exclusive of *Anlaby*), included the lands of *Tranby*.

On the other hand the lands in *Tranby* from the earliest period were tithable to *Kirk Ella* as being situate in that parish, the occupiers were always rated to and paid church rates in that parish and the *Easter* dues and all other ecclesiastical dues, and never paid tithes, church rates or any ecclesiastical dues to *Hessle*. Some of the residents of *Tranby* had seats in the parish

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church of *Hessle*, but not as of right, and some of the bodies of deceased inhabitants of *Tranby* had been buried in the church or churchyard of *Hessle*, but this was only under permission and not as of right, and double fees had been charged as in the case of strangers. The incumbent of *Hessle* sometimes married *Tranby* people when it was wished he should do so, but he married them not at *Hessle* but at *Kirk Ella* church, by the permission of the incumbent of that parish. In fact as to all ecclesiastical matters *Tranby* has uniformly and immemorially been treated and reputed as a part of the parish of *Kirk Ella*.

In the year 1792 stat. 32 G. 3. c. 109. was passed, intituled, "An Act for dividing, inclosing, draining, and improving the open fields, meadows, pastures, commons, and waste grounds, within the several townships or hamlets of *Hessle*, *Anlaby*, and *Tranby* in the county of the town of *Kingston upon Hull*, and for making a compensation in lieu of tithe for certain ancient inclosed lands within the said several townships or hamlets, and also within the township or hamlet of *Wooferton*, otherwise *Wolfreton*, in the same county." By sect. 79 it was declared to be a public Act.

In the preamble it was recited amongst other things that within the townships of *Hessle* and *Anlaby* were certain open fields, with balks or pieces of sward ground and meadows and pastures therein, respectively mentioned and described; and that "within the township or hamlet of *Tranby*" was a certain open field called by the name of *Tranby Field*, with several balks or pieces of sward ground, the whole containing about 400 acres; and in the townships of *Hessle* and *Tranby* are a certain stinted pasture and a common called by the name of

Hessle and Anlaby Common ; “ which said open fields, meadows, pastures, common, and waste grounds are situate within the several parishes of *Hessle* and *Kirk Elley*” (being the parish of *Kirk Ella* hereinbefore mentioned) ; and reciting, amongst other things, that the lord of “ the manor of *Hessle* and *Tranby*” was seised of and interested in the soil of the commons and waste grounds “ within the said manor ;” and that the lord of the manor of *Anlaby* was seised of and interested in the soil of the commons and waste grounds “ within the said manor ;” that the vicar of the parish and parish church of *Hessle* was entitled to certain glebe lands and common rights within the several fields, lands and grounds, or some of them, and that he and *Walter Strickland* were respectively entitled to all manner of tithes, both great and small, arising within such parts of the fields, lands and grounds as were situate within the parish of *Hessle* ; and that *Robert Carlisle Broadley*, Esquire, and *William Wade*, clerk, as vicar of the parish and parish church of *Kirk Elley*, were respectively entitled to all manner of tithes, both great and small, arising within such parts of the fields, lands and grounds as were situate within the parish of *Kirk Elley* ; and that “ as well the respective townships or hamlets of *Hessle*, *Anlaby*, and *Tranby* aforesaid, as the lands in each of them, belonging to the several proprietors in the said fields, lands, and grounds, lie intermixed and dispersed in small parcels.” Commissioners are then appointed for putting the Act into execution.

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Sect. 11. “ Provided always, that nothing herein contained shall authorize the said Commissioners to hear or determine any difference or dispute which may arise touching the right or title to the lands or other rights

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that may be claimed in the said open fields, meadows, pastures, common, and waste grounds, for which the parties may commence and prosecute such suits or remedies, at law or in equity, as they shall be advised and think proper."

Sect. 24. "And whereas disputes may arise between the inhabitants or proprietors of lands in the respective townships of *Hessle*, *Anlaby*, and *Tranby* aforesaid, and also the inhabitants or owners of lands in some of the parishes, townships, or places adjoining to the same, touching the respective boundaries thereof; and it will be necessary, upon the said intended division and inclosure, to settle and ascertain all such boundaries, as well of the said respective townships of *Hessle*, *Anlaby*, and *Tranby* aforesaid, as also of the adjoining parishes, townships, or places; therefore be it enacted, that the said Commissioners shall and may, and they are hereby authorized and empowered to enquire into, ascertain, set out, determine and fix, not only the boundaries of the said several townships or hamlets of *Hessle*, *Anlaby*, and *Tranby* aforesaid, but also the boundaries of such parishes, townships, or places adjoining to the same; and after the said boundaries shall be so respectively ascertained, set out, determined, and fixed, the same shall and they are hereby declared to be the boundaries as well between the respective townships of *Hessle*, *Anlaby*, and *Tranby* aforesaid, as also the parishes, townships, or places respectively adjoining to the same, subject to an appeal at the Quarter Sessions in manner hereinafter mentioned, any law, usage, or custom to the contrary notwithstanding."

Sect. 25 enacts that the Commissioners shall make such allotments to the vicar of *Hessle* and *Walter Strick-*

land as should be equal in value to the glebe lands respectively belonging to them within the lands and grounds directed to be inclosed, for and in lieu of such respective glebe lands.

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By sect. 26, the Commissioners were required to make allotments to the vicar of *Hessle*, *Walter Strickland*, *Robert Carlisle Bradley* and the vicar of *Kirk Ella* of parcels of land within the open fields thereby directed to be inclosed in lieu of all manner of tithes, both great and small, and all vicarial and ecclesiastical rights, dues and payments arising or payable within, for or in respect of the lands and grounds directed to be inclosed. Directions then follow for the division of the allotments amongst the persons in that section mentioned.

Sect. 27 contains powers for the general allotment of the residue of the lands.

By sect. 32, after reciting that the vicar of *Hessle*, *Walter Strickland*, *Robert Carlisle Broadley* and the vicar of *Kirk Ella* were respectively entitled to certain great and small tithes arising out of the several messuages and ancient inclosed lands within the several townships or hamlets of *Hessle*, *Anlaby*, *Tranby* and *Wooferton* aforesaid, and which were within the said several parishes of *Hessle* and *Kirk Ella*, the Commissioners were required by their award to order that the owners of the said messuages and inclosed lands should annually pay to the vicar of *Hessle*, *Walter Strickland*, *Robert Carlisle Broadley* and the vicar of *Kirk Elley* such sums of money as the Commissioners should deem to be a just recompense for all the last mentioned tithes.

By sect. 53 it was enacted that the Commissioners should draw up their award in writing, with a plan

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annexed thereto, as therein mentioned. The concluding provision of this section is in the words following:—
“The several allotments and divisions, and all orders, directions, regulations and determinations, so to be made as aforesaid, and declared in and by the same award or instrument, shall be final, binding, and conclusive unto all the parties interested therein.”

The Commissioners appointed by and acting under and in execution of the Act duly made their award in writing dated the 23rd *February*, 1796.

All the rated lands and tenements in *Tranby* in the occupation of the appellant and four respondents are dealt with in and by the award. Parts of them, which consisted of old inclosures in *Tranby*, were charged by the Commissioners pursuant to sect. 32 of the Act with tithe rents payable to *Robert Carlisle Broadley* and the vicar of *Kirk Ella* and their respective successors in lieu of their former rights to tithes in respect of the old inclosures, and which tithe rents have been since regularly paid. The remainder of the rated lands, and being the greater part thereof and consisting of allotments of *Tranby Field* and the other open lands in *Tranby*, were awarded, set out and allotted in different parts and allotments to certain persons through whom the present owners and occupiers thereof, including the appellant, respectively derive title.

The award does not purport to set out, determine or fix the boundaries of any townships or parishes otherwise or more particularly than is shewn in and by the descriptions and declarations after mentioned.

Of the fifty-one acres in respect of which the appellant is rated about thirty-eight acres are old inclosure charged with tithe rents as above mentioned; and the

award, in a schedule headed "*Kirk Ella* tything" specifying the annual payments to be made to *Robert Carlisle Broadley*, his heirs and assigns, states two pieces containing 24 a. 0 r. 1 p. to be in the township of *Tranby*. Of the rate of 3*l.* 4*s.* 2*d.*, at which the appellant was rated, 2*l.* 4*s.* 2*d.* is in respect of these fifty-one acres of old inclosure. The remainder of the fifty-one acres consists of new inclosure allotted by the Commissioners and declared by them to be in the township of *Tranby* and parish of *Kirk Ella*.

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The following is an extract from the award respecting one of the allotments for which the appellant was rated:—"We do also award, set out, allot and appoint unto the said *William Green* and his heirs all that other piece or parcel of land situate, lying and being in *Tranby Field* containing 12 a. 2 r. 18 p., be the same more or less, adjoining lands herein awarded to the said *Joseph Sykes* on or towards the east, lands herein awarded to *Francis Green* on or towards the west, *Old Inclosure* and *Maize Lane* on or towards the north, and *Swanland Road* on or towards the south; and we do order and direct that the said *William Green*, his heirs and assigns, shall make and for ever hereafter maintain good and sufficient ditches and fences on the east side and south end of this allotment, and we declare this allotment to be in the said township of *Tranby* and parish of *Kirk Ella* aforesaid."

Of the 255 acres and more for which the respondent *Thompson* is rated thirty acres are old inclosure, and are charged in the *Kirk Ella* tithing with a tithe rent to *Robert Carlisle Broadley* in the same manner as hereinbefore shewn with respect to the appellant's thirty-eight acres. Of the rate of 17*l.* 4*s.* 7*d.* at which the respondent

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Thompson is rated 2*l.* 0*s.* 6*d.* is in respect of these thirty acres of old inclosure.

All the remainder of the lands in question are new inclosure allotted in similar terms *mutatis mutandis*, and declared to be in the township of *Tranby* and parish of *Kirk Ella*.

The practice of rating *Tranby* lands to the poor rate as a part of *Hessle* was continued without opposition or objection until recently, when the parish of *Hessle*, finding their existing burial ground insufficient, expended a considerable sum of money, exceeding 1500*l.*, in purchasing a new burial ground and in the expenses connected therewith, which expenditure under the recent Burial Acts became a charge on their poor rate. The ratepayers of *Tranby*, who were entitled as of right to bury in the churchyard of *Kirk Ella*, which was sufficient for the necessities of that parish and was likely to continue sufficient for many years to come, objected to this new charge upon them, and became desirous, if they could legally do so, to put an end to the practice of rating the lands in *Tranby* as a part of *Hessle* parish; and the present appeal was brought with the concurrence of all of them to try its validity.

The question for the opinion of this Court was, whether the above mentioned lands and tenements in *Tranby* were liable to be rated to the relief of the poor in the parish of *Hessle*.

Prideaux and *Lewers*, for the respondents.—The inference from the facts stated is that the districts called *Tranby* and *Hessle* formed one reputed parish of *Hessle* for the purpose of the poor rate at the time of the passing of stat. 43 *El.* c. 2. The case comes within the

principle of *Sharpley*, appt., *The Overseers of Mablethorpe*, respts. (a), where it was alleged that there were two parishes each of which ought to be rated separately; and *Erle J.* said, p. 917, "Whatever might be their state as to ecclesiastical matters, this is a question as to civil rights; and as far back as living memory goes these rectories have for civil purposes been treated as one parish: and I see no reason to think that they are not one." [*Mellor J.* In that case there were two churches.] A reputed parish satisfies stat. 43 *El. c. 2.*; *Weeden v. Walker* (b), *Hilton v. Pawle* (c), *Nichols v. Walker* (d). And stat. 13 & 14 *Car. 2. c. 12. s. 21.* extends the law as to the relief of the poor to all townships and villages which are reputed as such (e); *Rex v. The Inhabitants of Rufford* (f), *Rex v. The Inhabitants of Welbeck, Nottinghamshire* (g). [*Mellor J.* referred to *Rex v. The Inhabitants of Standard Hill* (h).] *Dawson*, appt., *The Surveyor of Highways for Willoughby*, respts. (i), and *Reg. v. The Inhabitants of Ashby Folville* (k), were cases relating to highways. *Hessle cum Tranby* may be a township within stat. 13 & 14 *Car. 2. c. 12. s. 21.* The boundaries of parishes were originally ascertained by those of a manor or manors; churches were founded or built by the lords of manors, who were at liberty to appropriate the tithes of their lands as they pleased; and the boundaries of parishes were settled long after the foundation of churches, and were

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(a) 3 *E. & B.* 906.(b) 2 *Roll. Rep.* 160, cited in 16 *Vin. Abr.* 418, *Poor* (A.)(c) *Cro. Car.* 92.(d) *Cro. Car.* 394.(e) As to what is a township or vill within the meaning of that Act, see 1 *Nol. P. L.* 11. 14, 4th ed.(f) 1 *Str.* 512.(g) 2 *Str.* 1143.(h) 4 *M. & S.* 378.(i) 5 *B. & S.* 920.(k) 7 *B. & S.* 277.

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afterwards much varied and in many cases abridged and narrowed as new churches were built; *Lousley v. Hayward* (a), per Macdonald C. B., *Steer Parish Law*, 3rd ed., p. 5. It appears therefore that the division of the kingdom into vills is older than that of parishes; 16 *Vin. Abr.* 183, *Parish*, in margin. And a parish often includes several vills. In *Fleta*, lib. 4, cap. 15, § 9, it is said, Plures hameletti potuerunt pertinere ad unam parochiam; nor is there any reason why a township should not be partly in one parish and partly in another. *Hessle, Anlaby and Kirk Ella* are mentioned in *Domesday Book*; *Tranby* is not, and *Tranby* is not a township. [He referred to the definitions of vill in *Co. Litt.* 115 b, *Com. Dig. Parish* (C).] The inclination of the Courts is to uphold the status quo; *Rex v. The Inhabitants of Leigh* (b), *Dawson*, appt., *The Surveyor of Highways for Willoughby*, respt. (c), per Crompton J. It lies upon the appellant to shew that it is a legal impossibility for the township of *Tranby* to be part of the parish of *Hessle* for the purposes of the poor rate.

Stat. 32 G. 3. c. 109. in its preamble mentions "the manor of *Hessle* and *Tranby*." The declaration in the award made under that Act that certain allotments were in the township of *Tranby* and in the parish of *Kirk Ella* is inoperative. Sect. 11 limits the authority of the Commissioners to the adjudication of questions relating to the purposes of the Act, which were the inclosure of lands and commutation of tithes: it excludes from their jurisdiction disputes touching the title to land "or other rights," that is other than the right to tithes; and therefore a dispute relating to poor rate is

(a) 1 Y. & J. 583. 586.

(b) 3 T. R. 746.

(c) 5 B. & S. 920. 924.

excluded. Sect. 24 only authorised them to ascertain the boundaries of the townships of *Hessle*, *Anlaby* and *Tranby* in case of disputes arising, but no dispute has arisen, and the Commissioners therefore did not act under that section. They had no power to declare in what parish the lands they dealt with were. [They referred to stat. 17 G. 2. c. 37.]

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T. P. E. Thompson, for the appellants.—It is immaterial to inquire into the origin of vills or extra parochial places. The question is not whether *Tranby* is a separate township, but to which of the two parishes, *Kirk Ella* or *Hessle*, it belongs. The concluding paragraph of the case shews that the ratepayers of *Tranby* have good reason for objecting to any association with *Hessle*: they have no right of burial in that township, and their ecclesiastical association with *Kirk Ella* will render them liable to contribute to a new burial ground there if it should become necessary. The practice during the last 100 years of the occupiers of lands in *Tranby* combining with the occupiers of lands in *Hessle* for maintaining their poor and repairing their highways jointly has arisen from its being more convenient for the former to attend to parochial affairs in conjunction with the latter than with the occupiers of lands in *Kirk Ella*. It may have had its beginning in an agreement between the two townships which can be put an end to at any time; as in *Reg. v. The Inhabitants of Ashby Folville (a)*, where the Court said, “The proper conclusion we think is, that the repair of this highway by the parish of *Gaddesby* resulted from some arrangement

(a) 7 B. & S. 277. 284.

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come to between these parishes from considerations of mutual convenience, and which therefore could at any time be put an end to by either."

A township cannot legally form part of one parish for civil purposes whilst it forms part of another for ecclesiastical purposes. If the township of *Tranby* is within the ecclesiastical parish of *Kirk Ella*, it is so for all purposes; and the present state of things could not have a legal origin. [*Lush J.* The tithes in one parish might, with proper consents, be transferred to another. A township, though in a parish, may have appointed overseers.] The cases of *Hilton v. Paule* (a) and *Nichols v. Walker* (b) only shew that a portion of an ancient parish, which has a church and has managed its own ecclesiastical affairs, may be held a reputed parish under stat. 43 *El. c. 2.* for the separate maintenance of the poor. But the making of poor rates in a district, and the having a district overseer, will not make it a parish without the performance of marriages, burials, christenings and other parochial rites; *Rudd v. Foster* (c). [He also cited *Reg. v. Clayton* (d).] In *Sharpley*, appt., *The Overseers of Mablethorpe*, respta. (e), it was only held that two ecclesiastical parishes may form one civil parish, and the circumstances there were very peculiar. If *Tranby* can form part of the township of *Hessle* for the purpose of maintaining the poor it can do so also for the purpose of repairing the highways. But suppose the parish of *Kirk Ella* were indicted for non repair of the highways in *Tranby*, it could not set up

(a) *Cro. Car.* 92.(b) *Cro. Car.* 394.(c) 4 *Mod.* 157; *R. C. Rudd v. Morton*, 2 *Salk.* 501.(d) 13 *Q. B.* 354.(e) 3 *E. & B.* 906.

the liability of *Hessle* to maintain them ; *Dawson*, appt.,
The Surveyor of Highways for Willoughby, respt. (a).
 [He also cited *Reg. v. The Inhabitants of Ashby Fol-*
ville (b).] If it were legally possible that *Tranby*
 could be part of the township of *Hessle* for civil purposes
 there is no evidence that it was reputed part of that town-
 ship at the time of the passing of stat. 43 *El. c. 2*. The
 poor rate was levied according to ecclesiastical divisions
 and districts. In the ecclesiastical survey made in pur-
 suance of stat. 26 *H. 8.*, A.D. 1535, *Valor Ecclesiasticus*,
 vol. 5, p. 128, *Fereby, Elley, Wolleton, Anleby* and *Hesle*
 are mentioned as parishes in the county of the town
 of *Hull*. The designation in the preamble of stat.
 32 *G. 3. c. 109.* of the “Manor of *Hessle* and *Tranby*”
 may be a misprint for “manors,” as there is now no
 such manor as *Hessle cum Tranby*. Probably *Tranby*
 was for all temporal purposes separate from *Kirk Ella*
 like the hamlet of *Coleshill*, which was part of the parish
 of *Amersham* for ecclesiastical purposes in *Reg. v. The*
Overseers of Coleshill (c). The origin of the confusion
 with respect to the boundaries is in the fact recited in
 the preamble of stat. 32 *G. 3. c. 109.*, viz., that the
 townships of *Hessle, Anlaby* and *Tranby*, and “the lands
 in each of them, belonging to the several proprietors in
 the said fields, lands and grounds, lie intermixed and
 dispersed in small parcels.” The Commissioners were
 empowered by sect. 53 to make an award which should
 express their decision as to the situation of the lands ;
 and by sect. 53 a plan was to be annexed to the award
 and both were to be lodged in the vestry of the parish
 church of *Hessle*. [He also referred to the recitals in

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(a) 5 *B. & S.* 920.(b) 7 *B. & S.* 277.(c) 2 *B. & S.* 825 ; affirmed on error, 4 *Id.* 667.

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sects. 24 and 32.] The allotment of the piece of land in *Tranby Field* was an attempt to carry out the power given to them in sect. 24, and their declaration that it was in the parish of *Kirk Ella* is some evidence of the fact. [Mellor J. They had no right to make such a statement.]

MELLOR J. I am of opinion that the rate should be confirmed, and that the order of Sessions was right. It is a case of some difficulty, but unless the district of *Tranby* shews some legal objection to the state of things which has now continued so long we ought to give effect to it. Lord *Campbell* said, in the case of *Sharpley*, appt., *The Overseers of Mablethorpe*, respts. (a), "I can see no sufficient legal ground for disturbing a usage which has prevailed so long." Before the origin of parishes, and when churches were first founded, the land owners who founded them assigned the tithes of their lands to those churches, but that may have been anterior to the ecclesiastical division of the parishes. The tithes of lands in the district of *Tranby* may have been assigned to the church of *Kirk Ella*, and yet that ecclesiastical district may for all civil purposes have been formed into a township consisting of itself and *Hessle*, or it may be that after the ecclesiastical division of parishes the tithes of lands in *Tranby* were appropriated to the church of *Kirk Ella*; then having been formed into the township of *Hessle with Tranby*, and being so at the time of stat. 43 *El. c. 2.*, and subsequently of stat. 13 & 14 *Car. 2. c. 12.*, it became by reputation such a parish or township as might under those Acts be entitled to maintain its own

(a) 3 *E. & B.* 906, 916.

poor, and have all the civil privileges that belong to a parish or township. At the same time, owing to an actual bargain or an understanding on which the separation or union took place, it may have been the practice for the inhabitants of the district of *Tranby* to go to the parish church of *Kirk Ella*, which would account for the payment of church rates, *Easter* and other ecclesiastical dues to *Kirk Ella*. On the other hand, for a hundred years at least the lands in *Tranby* have uniformly been rated to the poor for the township of *Hessle* as part of that township, and have uniformly contributed to the highway rates. There is evidence that there is a manor of *Hessle cum Tranby*, though I do not rest much upon that. No doubt in the origin of ecclesiastical divisions the parochial limits generally followed the ambit of manors. Though the instances in which a parish includes two manors are not uncommon, there is no case in which a parish has extended into and formed part of two manors. However that may be, here is abundant evidence that the township of *Hessle with Tranby* is a district properly maintaining its own poor, and has power and authority to make a rate.

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LUSH J. We ought not to disturb a state of things which has existed for so long a time unless we see that it could not have a legal origin. The case finds that for 100 years the inhabitants of *Tranby* have been assessed to the poor rate by the overseers of the township of *Hessle*, and as far back as living memory goes have concurred with that township in the maintenance of their highways: there is no evidence to the contrary, and I infer that there is none in any entries so far back as they can be traced. On the other hand, from the

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earliest period the lands in *Tranby* have been treated and reputed as in the parish of *Kirk Ella*. I think for several reasons this state of things may have had a legal origin. It is sufficient to refer to one which is probable, viz., that *Tranby* was originally part of the township of *Hessle*, and subsequently became part of the parish of *Kirk Ella*. There is no legal impossibility in a township running into two parishes; and in the Inclosure Act, 32 G. 3. c. 109., it is called the township of *Tranby*, and sometimes the hamlet of *Tranby*; though I think that evidence is wanting to shew that it ever was a township of itself, because it had not a constable nor a church of its own for the celebration of Divine service, sacraments and burials; *Co. Litt.* 115 *b.* The association of *Tranby* with *Hessle* in the maintenance of the poor and repair of the highways could have had a legal origin by virtue of stat. 13 & 14 Car. 2. c. 12. s. 21., which would have enabled this township, though it might consist of portions of two parishes, to appoint overseers of its own, and separately to maintain its own poor. Therefore I infer that *Tranby*, not being a township of itself, was part of the township of *Hessle*.

HANNEN J. If we assume that *Hessle* and *Tranby* were originally united as one township all difficulties vanish; and therefore, as it is proper to uphold a state of things which has existed so long, we should adopt that inference. That there was from a very early date some connection between *Tranby* and *Hessle* appears both from negative and positive evidence. The negative evidence is that, though three districts have been referred to as mentioned in *Domesday Book*, *Tranby* is not mentioned; therefore it must be included in one or other

of those districts. The positive evidence is the fact that the lands in *Tranby* have been rated with *Hessle* for the repair of its highways. As a township is liable to repair its highways irrespective of parochial divisions, that is consistent with the supposition that they belong to one township. According to *Co. Litt.* 115 *b.* and other authorities cited in *Com. Dig. Parish* (C. 1) (*a*), a vill or township is a natural division; but the division of parishes appears to be artificial, and depends on circumstances which cannot now be ascertained. It may be that when the parishes of *Hessle* and *Kirk Ella* were formed the artificial boundary cut the natural division into two parts, and in this way *Tranby* may have become for ecclesiastical purposes attached to *Kirk Ella*, while for civil purposes it remained connected with the old township of *Hessle*. If this state of things existed down to the time of stat. 43 *El.* c. 2. and subsequently, and if it had become inconvenient at the time of the passing of stat. 13 & 14 *Car.* 2. c. 12., that would introduce a new state of things, under which *Tranby* in maintaining its poor would separate from *Kirk Ella* and revert to its old civil association with *Hessle*.

Order of Sessions confirmed.

(*a*) See also *Fortescue de Laud. L. A.*, sect. 24, and note (*c*) by *Amos*.

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*Saturday,
May 2nd.*

CARR, appellant, STRINGER, respondent.

5 & 6 W. 4.
c. 63. s. 28.
Unjust scales.

A pair of scales had a hollow brass ball hanging upon the weight end of the beam; the ball was constructed with a neck which could be unscrewed so as to allow shot to be placed inside, and being hung by a hook upon the beam was easily removable. The scales were correct in that state; but if the shot inside the ball was removed the scales were unjust and against the purchaser. Upon an information under stat. 5 & 6 W. 4. c. 63. s. 28.: Held, that justices were justified in finding that the ball loaded with shot was no part of the scales, and that consequently they were unjust.

CASE stated under stat. 20 & 21 Vict. c. 43.

At a Petty Session holden at *Tunbridge*, in the county of *Kent*, an information was preferred by the respondent, being the inspector of the weights and measures for the district, under stat. 5 & 6 W. 4. c. 63. s. 28., that three pairs of scales found in a shop kept by the appellant and in his possession were unjust, and upon the hearing the justices convicted the appellant.

The respondent, on the 27th *August*, 1867, visited the shop of the appellant and there found three pairs of scales which were correct as to balance in the way they then were, but upon the weight end of the beam of each pair was hanging a hollow brass ball. These brass balls were constructed with necks which could be unscrewed so as to allow shot to be placed in the interior, and they were hung by stout brass wire hooks upon the beams of the scales and were easily removable therefrom by merely lifting them off. The respondent took one of these balls off a pair of scales and having unscrewed the neck he removed the shot with which it was partly

filled and then replaced the ball in its former position, and on testing the scale found the latter to be then unjust and against the purchaser. Similar balls were very generally used by tradesmen for the purpose of adjustment.

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It was contended by the respondent that this brass ball was not part of the scales and was easily detached therefrom; and that, even if the ball could be considered part of the scales, yet the shot with which the same was loaded could not be so considered as it could be removed at any time without apparent alteration in the scales, and consequently the scales themselves were unjust. On behalf of the appellant it was contended that the brass ball with its load of shot was a mere instrument of adjustment attached to and forming part of the scales; that the scales were from time to time corrected by adding to or removing shot therefrom, and as the scales in question were correct at the time they were used by the appellant and first examined by the respondent, and were only rendered incorrect by the respondent removing the ball or the shot, the appellant could not be convicted of any offence.

The justices were of opinion that the ball did not form part and parcel of the scales, as it merely hung on the beam by its own weight and could be detached in an instant. They were further of opinion that as the shot could be removed from the ball and replaced at pleasure it could not be considered a proper instrument of adjustment or part of the scales. They therefore found that the scales were unjust.

The questions for the opinion of the Court were, whether the justices were correct in their view of the case on either or both points.

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Anderson, for the respondent.—The scales themselves were unjust; for the ball loaded with shot was no part of them. This distinguishes the present case from *The London and North Western Railway Company v. Richards (a)*. [He was then stopped.]

Cohen, for the appellant.—These scales when properly adjusted weighed correctly the articles placed in them, as did the machine in *The London and North Western Railway Company v. Richards (a)*. [Cockburn C. J. There was great peculiarity in that case: there the weighing machine was right in the first instance, but was liable to derangement from atmospheric and other causes, and some mode of adjustment was necessary: here the scales are from the first incorrect, and the ball loaded with shot is used to make them appear just, not to compensate for wear and tear.] A machine is not unjust because the contrivance by which it is adjusted can be easily removed. The security against fraud is the contingency of the inspector coming in at any moment to examine the weights and measures. In *The Great Western Railway Company*, appts., *Bailie*, respt. (b), the weighing machine had met with an accident which made it incorrect, and an allowance for the error was made in using it.

COCKBURN C. J. This conviction should be affirmed. I am far from saying that if from wear and tear or any other cause, as in *The London and North Western Railway Company*, appts., *Richards*, respt. (a), scales or any weighing machine become so affected as to require adjustment, and in order to effect this some-

(a) 2 B. & S. 326.

(b) 5 B. & S. 928.

thing is added so as to make it part of the machine, the scales or other weighing machine would be unjust. But it is very different if the instrument itself is imperfect and unjust, and can only be rectified and adjusted by the introduction of a temporary contrivance which the tradesman may at any time withdraw. Here the contrivance was no part of the machine, and there is the more reason for holding that the scales are unjust because it can be readily used for the purposes of fraud, as by unhooking the ball or removing the shot the scales become unequal against the customer and in favour of the seller. It was said that the possibility of the inspector's visit would prevent a fraudulent use of the contrivance; but he cannot always be at hand. I think that this enactment was directed against this sort of contrivance.

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BLACKBURN J. Stat. 5 & 6 W. 4. c. 63. s. 28. creates two different offences, the having weights or measures light or otherwise unjust, which are to be seized and forfeited in addition to the penalty, and the having steel-yards or other weighing machines incorrect or otherwise unjust, for which a penalty only is inflicted (a). This information is for having three unjust pairs of scales, which clearly are weighing machines, and the principal question is whether the evidence justifies the magistrates in finding that they were incorrect or otherwise unjust. Without the brass ball and the shot inside it the scales are incorrect and against the purchaser. Does the brass ball with the shot prevent them being unjust? If the ball were "an integral part of the machine," and brought out a correct result, the scales would not be incorrect according to the reasoning of *Crompton J.* in *The Lon-*

(a) See *Thomas*, appt., *Stephenson*, respt., 2 E. & B. 108.

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don and North Western Railway Company v. Richards (a).

I do not say that a machine with a contrivance forming an integral part of it by means of which it brought out correct results would necessarily not be unjust ; for there may be ingenious contrivances of that kind to facilitate frauds. But in the present case fraud is not found nor imputed ; and indeed it would be irrelevant to find fraud, the issue being whether the scales are unjust. As to the finding of the justices that the ball, being upon one of the beams, was not part of the scales, there was ample evidence from which they might draw that conclusion, and that they were no more part of the machine than a half-ounce weight which might at pleasure be placed or not in one of the scales. I agree that a contrivance, though removable, may be part of a machine, but the fact that it is easily detached is an important element in considering whether it is part of the machine. If scales must require adjustment the owners should take care that the contrivance is screwed on the machine so as not to be removable, and that if it is removed the machine should be against the seller ; otherwise the justices will be right in drawing an inference against them.

Conviction affirmed.

(a) 2 B. & S. 326. 334.

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OWENS *against* WOOSMAN.OWENS *against* JONES.Monday,
May 4th.

The County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 10.*, enacts that in actions of tort brought in a superior Court "a Judge of the Court in which the action is brought" may make an order that unless the plaintiff give security for costs or satisfy the Judge that he has a cause of action fit to be prosecuted in the superior Court proceedings shall be stayed or the cause be remitted for trial before a County Court. A Judge of the Common Pleas made an order under that section that actions for an irregular execution under County Court process brought in this Court against the registrar of the County Court and the plaintiff in the original action should be remitted to be tried in the County Court. Held,

1. That the order might be made by a Judge of one of the other Courts sitting at Chambers under stats. 11 *G. 4 & 1 W. 4. c. 70. s. 4.* and 1 & 2 *Vict. c. 45. s. 1.*

2. That the order was subject to be reviewed by this Court.

3. That the action was properly remitted for trial before a County Court, but the order was varied as to the County Court in which the trial should be.

County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 10. Order remitting cause to County Court. Jurisdiction of Judge of one Court over action in another.

11 *G. 4 & 1 W. 4. c. 70. s. 4. 1 & 2 Vict. c. 45. s. 1.*

APRIL 17. *Croome* obtained rules calling upon the defendant in each action to shew cause why two orders made by *Willes J.* under The County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 10.*, should not be rescinded or varied, by which it was ordered that the actions should be remitted to the County Court of *Montgomeryshire* holden at *Llanidloes* and *Newtown* respectively unless the plaintiff within fourteen days gave security for the defendants' costs to the satisfaction of the Master.

The defendant *Jones* had obtained a judgment against the plaintiff in the County Court of *Montgomeryshire* holden at *Newtown*, of which the defendant *Woosman* was registrar, and an order was made for payment of the amount by instalments. The present actions were brought for a seizure of the plaintiff's goods for default of payment of one of the instalments on a day before it was due.

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Stat. 30 & 31 *Vict. c.* 142. *s.* 10. "It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort may be brought in a superior Court to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff, and thereupon a Judge of the Court in which the action is brought shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the Masters of the said Court, or satisfy the Judge that he has a cause of action fit to be prosecuted in the superior Court, all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the Judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named; &c."

By stat. 11 *G. 4* & 1 *W. 4. c.* 70. *s.* 4., every Judge of the superior Courts of common law, to whatever Court he may belong, is authorized to transact such business at chambers or elsewhere depending in any of those Courts, as relates to matters over which the Courts have a common jurisdiction and as may according to the course and practice of the Court be so transacted by a single Judge.

By stat. 1 & 2 *Vict. c.* 45. *s.* 1. "every Judge of the Courts of Queen's Bench, Common Pleas, or Exchequer shall have equal jurisdiction, power and authority to transact out of Court such business as may according to the course and practice of the Court be so transacted by a single Judge relating to any suit or proceeding in either of the said Courts of Queen's Bench or Common

Pleas or on the common law or revenue side of the said Court of Exchequer, &c., or relating to any other matter or thing usually transacted out of Court although the said Courts have no common jurisdiction therein, in like manner as if the Judge transacting such business had been a Judge of the Court to which the same by law belongs."

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McIntyre, for the defendant in the first action, and *Thesiger*, for the defendant in the second action, shewed cause.—First. The objection taken is that *Willes J.* had no jurisdiction under stat. 30 & 31 *Vict. c. 142. s. 10.* to make the orders, the actions being in this Court. But by stat. 1 & 2 *Vict. c. 45. s. 1.*, extending stat. 11 *G. 4 & 1 W. 4. c. 70. s. 4.*, a Judge of either of the Courts may at chambers transact the business of every Court as if he was a Judge of that Court. In *Palmer v. The Justice Insurance Company (a)*, on stat. 7 & 8 *Vict. c. 110. s. 68.*, by which execution on a judgment against a Joint Stock Company may be issued against a shareholder "by leave of the Court, or of a Judge of the Court, in which such judgment, decree, or order shall have been obtained," it was held that a Judge of any Court sitting at Chambers has the same jurisdiction as a Judge of the Court in which judgment was obtained.

Secondly. In answer to the objection that the Court has no power to review the decision of a Judge at Chambers: sect. 10 of stat. 30 & 31 *Vict. c. 142.* requires the plaintiff to satisfy the Judge that he has "a cause of action fit to be prosecuted in the superior Court," and this Court will not interfere with his decision. [*Cockburn C. J.* On appeal from the order of a Judge

(a) 6 *E. & B.* 1015.

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this Court must exercise its own discretion and be satisfied that the plaintiff has “a cause of action fit to be prosecuted in the superior Court.”] The orders do not deprive the plaintiff of any right: they merely regulate procedure (a). [He then contended that the learned Judge had exercised a sound discretion.]

Denman and Croome, for the plaintiff.—First. The language of sect. 10 of stat. 30 & 31 *Vict. c. 142.* compared with that of sect. 7 shews that it was intended that the power conferred by sect. 10 should be exercised by a Judge of the Court in which the action was brought. In actions of contract the power to order the cause to be tried in a County Court is given by sect. 7 to “a Judge at Chambers.” [*Blackburn J.* What object could the Legislature have for using the words in sect. 10 in a restrictive sense?] The object might be that the proceedings from the beginning to the end should be under the inspection of the Court in which the action was brought. [*Blackburn J.* The Legislature sometimes change words for the mere grace of style. *Cockburn C. J.* The words “a Judge at chambers” in sect. 7 must mean the same as “a Judge of the Court in which the action is brought” in sect. 10: under sect. 7 an application could not be made in an action in this Court to a Judge of the Common Pleas or of the Exchequer sitting at chambers as such.] In *Palmer v. The Justice Insurance Society* (b) the Judge, acting on stat. 7 & 8 *Vict. c. 110. s. 68.*, had to exercise a merely ministerial function. Stat. 11 *G. 4 & 1 W. 4. c. 70. s. 4.* gives power to every Judge to transact such business depending in any of the Courts “as may, accord-

(a) See *Kimbray v. Draper*, ante, p. 80.

(b) 6 *E. & B.* 1015.

ing to the course and practice of the Court, be transacted by a single Judge." It is a strong thing to say that this applies to a new jurisdiction conferred on the Judges of a particular Court. [*Blackburn J.* The practice has been for the Judges sitting at chambers to exercise, without regard to the Court in which the proceeding was, the powers given by new statutes to single Judges.]

Secondly. The County Courts Act, 1856, 19 & 20 *Vict. c.* 108. s. 60., which enacts that no officer of a County Court in executing a warrant, and no person at whose instance it is executed, shall be deemed a trespasser by reason of any irregularity, does not prohibit an action for special damage. [*Blackburn J.* That section does not give a cause of action but restrains the party aggrieved to an action on the case, and following the statute of *Gloucester* deprives the plaintiff of costs, unless the damages exceed 40s.] The plaintiff will have no right of appeal from the decision of the County Court under sect. 68 of stat. 19 & 20 *Vict. c.* 108. [*Blackburn J.* If not, we cannot on that ground treat sect. 10 of stat. 30 & 31 *Vict. c.* 142. as a nullity.] Also it is doubtful whether the orders do not deprive the plaintiff of his right to have a jury. [*Hannen J.* They are only a short form of remitting the causes to the County Court.] At all events the Court will vary the order in the action against the defendant *Woosman*. By sect. 21 of stat. 19 & 20 *Vict. c.* 104. the plaintiff may bring his action against an officer of a County Court in any adjoining district the Judge of which is not the Judge of the Court of which the defendant is an officer. The Judge has no power to deprive the plaintiff of that option.

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1868. <hr style="width: 100%;"/> OWENS v. WOOSMAN. OWENS v. JONES.	COCKBURN C. J. These rules must be discharged, except that the causes should be sent to the neighbouring County Court of <i>Shropshire</i> held at <i>Oswestry</i> instead of being remitted to the County Court of <i>Montgomeryshire</i> .
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The first objection is that the power under stat. 30 & 31 *Vict. c. 142. s. 10.* to make such an order is limited to a Judge of the Court in which the action is brought. I think that is not tenable. The words "Judge of the Court in which the action is brought" must be construed to extend to a Judge of one of the other Courts sitting and acting as a Judge of that Court. The Legislature in passing stat. 30 & 31 *Vict. c. 142. s. 10.* must have had in their mind the provisions in stats. 11 *G. 4 & 1 W. 4. c. 70. s. 4.* and 1 & 2 *Vict. c. 45. s. 1.*, by which in business which may be transacted by a single Judge the Judges of each of the Courts have power to act for the others. If this power did not exist there would be great inconvenience, and when the Judges were absent on the circuit and in the long vacation stat. 30 & 31 *Vict. c. 142. s. 10.* would be a dead letter, and there is no motive for confining the jurisdiction to the Judges of the Court in which the action is brought to the exclusion of the Judges of the other Courts. I agree that, an action being brought in one of the superior Courts, it would be an anomalous application to a Judge not being and not sitting as a Judge of that Court to send it to be tried in the County Court; but when the Judge is sitting as a Judge of the Court in which the action is brought, and virtually is a Judge of that Court, there is no reason why he should not have the power.

On the merits the causes are very fit to be tried in a County Court; but it is better that the venue should be changed.

BLACKBURN J. The language of stat. 30 & 31 *Vict. c. 142. s. 4.* is perfectly intelligible. Formerly an order in a cause was always made in Court; but by stat. 11 *G. 4 & 1 W. 4. c. 70. s. 1.*, it might be made by one of the Judges of either of the Courts, and by sect. 4 of that statute and sect. 1 of stat. 1 & 2 *Vict. c. 45.* a Judge of any of the Courts may make orders relating to suits or proceedings in either of the other Courts as if he was a Judge of that Court. And the words "a Judge of the Court in which the action is brought" must mean a Judge making orders and sitting and acting as a Judge of that Court. If it had appeared to be the object of the Legislature to impose a personal trust on the Judges of the Court in which the action was brought we must have given effect to it. And why they use different language from that in other sections I cannot see. But it would be absurd that no order should be made in actions brought in two of the Courts while a Judge of the other Court was sitting for all the Courts.

As to the other point, I do not agree that this Court cannot review the decision of the Judge under stat. 30 & 31 *Vict. c. 142. s. 10.* If the plaintiff satisfied the Court that the cause of action was fit to be tried in the superior Court we should make the rules absolute notwithstanding the orders of my brother *Willes*. But I am satisfied that the plaintiff has no such cause of action, and therefore the rules must be discharged except to change the County Court in which the trial is to be.

HANNEN J. The words of stat. 7 & 8 *Vict. c. 110. s. 68.*, which were under consideration in *Palmer v. The*

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Justice Assurance Society (a), are quite as strong if not stronger than those in stat. 30 & 31 *Vict. c. 42. s. 10.*, and it was held that the power there given might be exercised by the Judge of a Court other than that in which judgment had been obtained. That is a convenient construction, and we must see some good reason for departing from it.

After the orders of *Willes J.* the bearing of these cases is this: we have power to control his discretion; but a strong case ought to be made to induce us to overrule his discretion in the exercise of a duty in the first instance imposed on him, and none such has been made.

It was ordered, that the orders of *Willes J.* be varied by remitting these causes for trial before the Judge of the County Court of *Shropshire* holden at *Oswestry* instead of before the Judge of the County Court of *Montgomeryshire* holden respectively at *Llanidloes* and *Newtown*, and that the residue of the rules be discharged and no costs of these applications be allowed on either side.

(a) 6 *E. & B.* 1015.

Thursday,
April 16th.

ENGEL *against* FITCH and others.

[Reported ante, p. 85.]

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TOMLIN and others *against* DUTTON and MILLER.Friday,
April 24th.

1. A composition deed between partners of a firm and the creditors of the partnership which makes no provision for creditors of the partners, is not within The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192., and therefore does not bind non-assenting joint creditors of the partnership.

Bankruptcy Act, 1861.
24 & 25 Vict. c. 134. s. 192.
Composition deed.
Partnership.
Joint creditors.
Plea.

2. A composition deed between *A.* and *B.* partners, and their creditors, by which *A.* assigned to *B.* his moiety of the partnership goods, contained a proviso that if before the composition should be fully paid to the creditors *A.* should be adjudicated bankrupt or attempt to make any assignment of his estate for the benefit of his creditors, or any arrangement with them differing from that, the deed should be void. Held, that in pleading that deed it was not necessary to negative the happening of those events.

DECLARATION on a bill of exchange drawn by the plaintiffs for 41*l.* 5*s.*, payable one month after date, and accepted by the defendants.

Plea. That after the accruing of the plaintiffs' claim, the defendants, as partners in the firm of *Dutton & Miller*, were indebted to the plaintiffs and to divers other persons, and thereupon a deed was made between the defendants of the first part, the defendant *Dutton* of the second part, *W. Boulton* of the third part, and the several persons, companies, and copartnership firms thereunder named, and whose names and seals were thereunder written, or who had in writing assented to and approved of those presents, being respectively partnership creditors of the late firm of *Dutton & Miller*, of the fourth part, and all other, if any, the creditors of the partnership of *Dutton and Miller*, of the fifth part. The deed was set out. After reciting (among other things) that *Dutton & Miller* were indebted to the several persons named in the Schedule thereunder written in

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the several sums of money set opposite to their respective names, and it was believed that they were not indebted to any other persons on the partnership account, and that they were unable to pay the debts of the partnership in full, and that the partnership formerly existing between them had been dissolved by mutual consent; and it had been arranged and agreed by and between *Dutton & Miller* and the several persons, companies, and copartnership firms thereunder named, being parties thereto of the fourth part, and also all other (if any) the creditors of the partnership firm of *Dutton & Miller* being parties thereto of the fifth part, that *Miller* should be released from the liability to pay the claims and demands of the partnership creditors upon making the assignment thereafter contained to *Dutton*, and that *Dutton* should pay a composition of 6s. 8d. in the pound, secured by the joint and several covenant of himself and *Boulton* thereafter contained, and that *Dutton & Miller* should receive the release from the parties thereto of the fourth part thereafter contained : IT WAS WITNESSED that *Miller* assigned to *Dutton* his moiety of the goods, wares, stock in trade, credits, book debts, chattels and effects belonging and due and owing to *Dutton* and *Miller* as copartners absolutely and for ever; and all the estate, &c.; with a power of attorney to sue for and receive all credits, sums of money and effects of the partnership. After usual covenants by *Miller* there was a mutual release by *Dutton & Miller* and a release by the creditors of *Dutton & Miller*, parties thereto of the fourth and fifth parts, with the intent that the same should, under the provisions of The Bankruptcy Act, 1861, be valid, effectual and binding on all the creditors of *Dutton & Miller*, whether executing or in writing

assenting to those presents or not, from all partnership debts owing by them to the releasing parties respectively, and from all claims and demands whatsoever for or in respect of the same, without prejudice however to any lien held by any creditors upon any property of *Dutton & Miller* or to any other security for their debts. Covenant by *Dutton* and *Boulton* with the several persons parties of the fourth and fifth parts to pay the composition of 6s. 8d. in the pound upon the amounts of the debts due to them. Provided that if default should be made in payment of any of the instalments, or if before the composition should be fully paid to the creditors *Dutton* should be duly adjudicated bankrupt or attempt to make any assignment of his estate for the benefit of his creditors, or any arrangement with his creditors differing from that arrangement, those presents and the release of *Dutton* should be at an end and void, and the creditors should be at liberty to sue or prove for the full amount of their debts less the amount which might have been received by them. The plea then alleged that a majority in number representing three-fourths in value of the creditors of the defendants whose debts respectively amounted to 10*l.* and upwards did in writing assent to and approve of the deed, and all conditions precedent were performed necessary to make the deed available and a binding deed of arrangement and composition within the meaning of the 192nd section of The Bankruptcy Act, 1861; and all conditions having been performed and all things having happened necessary in that behalf the plaintiffs became and were bound by the deed as if they had been parties thereto and had duly executed the same.

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The plaintiff also replied that at the date of the execution of the indenture the defendants were, in addition to the partnership debts, indebted severally and separately in divers sums of money due and owing from them respectively to divers persons not being creditors of the partnership but being separate creditors.

Demurrer, and joinder.

Lumley Smith, for the plaintiff.—A deed between debtors and their creditors under sect. 192 of The Bankruptcy Act, 1861, 24 & 25 *Vict. c. 134.*, must be a deed between the debtors and all their creditors both joint and separate, or some person or persons on their behalf. The deed relied upon in the plea, being for the benefit of the partnership creditors only and dealing only with the partnership debts and assets, is not a valid deed under sect. 192, and therefore is not binding upon the plaintiffs, who did not assent to it, though they are partnership creditors. Such a deed is unreasonable, as it creates an inequality between the joint and separate creditors and deprives the former of their rights against the separate estates of the plaintiffs, while it leaves the latter unrestricted in their remedies against them. The deed treats the partnership as a single individual, but there is no such thing as the bankruptcy of a partnership—it is the bankruptcy of the individuals forming it. The word “creditors” in sect. 192 means all the creditors; *Clapham v. Atkinson* (a). The case of *Ex parte Calvert, In re Calvert* (b), decided on stat. 12 & 13 *Vict. c. 106. s. 224.*, which used the word “trader” in-

(a) 4 *B. & S.* 722.(b) 3 *De G. & J.* 95.

stead of "debtor," is an authority that when the debtors are a partnership the word "creditors" means separate as well as joint creditors. *Knight Bruce* L. J. said, p. 109, "Now perhaps in every instance of an indebted firm, consisting of two or more persons, but certainly for all present purposes (the language of the deed before us being considered), the word 'creditors' in the 224th section must, I think, be held to mean the separate creditors as well as the joint creditors." And *Turner* L. J., p. 111, "It was said that by the 226th section of the Act the certificate was made *primâ facie* evidence. But what is the certificate? Not that six-sevenths in number and value of the creditors with whom the arrangement was made have signed the deed, but that six-sevenths of the creditors of the six partners have signed it. The certificate, therefore, is not in compliance with the Act, and can be of no avail, . . . But then it was said that there was no proof that there were any other creditors than those of the six. I think, however, that it rested upon the appellants to shew that there were no such other creditors. It was upon them to establish the validity of the deed by proving that it had been executed by six-sevenths in number and value of the creditors with whom it purports to have been made. Whether it was incumbent upon them, as was argued at the bar, to shew that it had been executed by six-sevenths of each class of the creditors, I give no opinion." [*Lush* J. The deed in that case affected to deal with separate creditors and assigned the separate assets of the members of the firm; and the objection was that it was not shewn that any separate creditor had executed or signed the deed or authorized it to be so. *Blackburn* J. It was an arrangement with

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the two classes of creditors, and the objection was one of fact, not an impeachment of the deed. The language however of *Turner L. J.* assists the plaintiffs.] In 2 *Lindley Law of Partnership*, p. 1204, 2nd ed., it is said, "Where the debtor is a partner the deed must be for the benefit as well of the joint as of the separate creditors. It is obvious that a deed for the benefit of one class only, can be of no avail against the other class," for which *The European Central Railway Company (Limited) v. Westall* (a) is cited; "and, from the principle that to be valid under sect. 192 a deed must be for the benefit of all creditors, a deed which provides only for one class cannot be binding on non-assenting persons even within that class." In *Ex parte Glen, In re Glen* (b), which was the converse of the present case, it was held that a composition deed by a debtor, who carried on business in partnership, executed for the benefit of his separate creditors only and assented to by the requisite majority of separate creditors, was not binding on non-assenting separate creditors. Lord Cairns said, *L. R. 2 Chanc. App.* 673, "The consequence of holding that a deed made for the benefit of the separate creditors only is binding upon the non-assenting minority of them would be this, that whereas, but for the deed, they would be entitled to sue the debtor, and take out execution, and avail themselves of all other advantages which their diligence might procure for them, they would, in consequence of the deed, have their hands tied, and be unable to pursue their remedies, while the joint creditors would be perfectly free. The result might be, that the whole separate

(a) 6 B. & S. 970.

(b) *L. R. 2 Chanc. App.* 670; 36 *L. J. Bank.* 51.

estate might be swept away by the joint creditors, the separate creditors losing the benefit of their legal remedies, without obtaining anything in return. . . . It is, however, enough to say that the construction contended for on behalf of the appellant is not warranted by the words of sect. 192." And *Rolt* L. J. gave the same reasons for his judgment.

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The plea does not negative the existence of separate creditors, and the replication, for greater caution, alleges that fact. The allegation in the plea, that the requisite majority of "the creditors of the defendants" assented to the deed, means a majority of the joint creditors, which is not such a majority as is required by sect. 192. Also the plea does not negative any of the events having happened after the execution of the deed on the happening of which it would by the concluding proviso become void. [*Blackburn* J. It rests on the plaintiffs to shew the affirmative.]

Jones, for the defendants.—In *Ex parte Glen*, *In re Glen* (a) one of two partners made a composition deed with his separate creditors; and such a composition would be unjust because the joint creditors might sweep away all the property. But that reasoning does not apply to a case where partners make an arrangement with their joint creditors. The separate creditors have no remedy at law against the joint estate; though it may be seized it cannot be sold; there must be a suit in equity for an account. [*Mellor* J. The consequences would not be quite the same nor flow so directly in the one case as in the other; but in the case before us they

(a) *L. R. 2 Chanc. App.* 670; *36 L. J. Bank.* 51.

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might be serious.] As to the construction of sect. 192: between "a debtor and his creditors, or *any of them*;" the latter words are consistent with a deed made with some of the creditors. The deed is to be binding "on all the creditors of such debtor;" that means all affected by the deed. [*Lush J.* You read the section as if it said, "Every deed made between joint debtors and their creditors, or any of them, relating to the debts or liabilities of the joint debtors and their release therefrom, &c." Suppose either of these partners were members of another firm the arguments of Lord *Cairns* would apply.] There are no words in sect. 192 restricting the parties either to one form of composition with joint creditors and another form with separate creditors, or requiring that they must compound with both together. There is no reason why in such a case as this there should not be two composition deeds, one for the benefit of joint creditors, the other for the benefit of separate creditors. Under the old bankruptcy law there were joint and separate commissions.

Lumley Smith, in reply.—By the interpretation clause, sect. 229, the word "creditor" "shall mean also any two or more persons being partners;" but there is no definition extending the meaning of the word "debtor." [He was then stopped.]

BLACKBURN J. The plea is founded on a deed made between two joint debtors and the creditors of both, excluding the separate creditors of each. If such a deed is within stat. 24 & 25 *Vict. c. 134. s. 192.* the Legislature has given power to the joint creditors to

bind a separate creditor, but it rests on those who assert that such a power is given to shew the words of the statute which give it, for there is no such power at common law. Sect. 192 enacts that a composition deed made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, shall be as binding "on all the creditors of such debtor" as if they were parties to and had executed the deed, provided certain conditions are observed. It is obvious that this refers to a single debtor and his creditors. It has been long established that a deed may be made between a debtor and a requisite majority of his creditors; the words "or any of them" meaning a majority in number representing three fourths in value. But it is not binding unless it is made for the benefit of all, who in the present case would be all the creditors of the firm and of the individual members of it. Mr. *Jones* argued that a firm may compound with the creditors of the firm, and suggested that we may read the word "debtor" as plural; and then a firm which had contracted joint debts might, with the assent of a majority in number and value of the joint creditors, make a composition deed binding upon the separate creditors. I think that would not be a reasonable provision. It is however sufficient to say that there are no words in sect. 192 supporting such a construction. Indeed Mr. *Jones* did not rely on any, but he argued that the consequences here would not be so mischievous as those pointed out in *Ex parte Glen, In re Glen (a)*. This may be an argument for the Legislature, but it does not affect the construction of sect. 192.

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MELLOR J. There may be reasons why the Legislature should authorize a partnership to make a composition between them and their joint creditors. But there is nothing in sect. 192 of stat. 24 & 25 *Vict.* c. 134. which enables me to put that construction on it, and the reasons given by the Lords Justices in *Ex parte Glen*, *In re Glen* (a) shew that they would not have put on it that for which Mr. Jones contends.

LUSH J. The deed in the present case is open to all the objections stated by the Lords Justices in *Ex parte Glen*, *In re Glen* (a), and the construction they gave to sect. 192 of stat. 24 & 25 *Vict.* c. 134. is the proper one, for it says that the deed shall be binding on all the creditors. This deed would bind all the separate creditors of each debtor though they had no voice in assenting to or dissenting from it.

Judgment for the plaintiff on both demurrers.

(a) *L. R. 2 Chanc. App.* 670; 36 *L. J. Bank.* 51.

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WIGFIELD and others against NICHOLSON.*Friday,
April 24th.*

1. **If a composition deed is within the purview of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192., the Court will not overrule the decision of a statutable majority of the creditors as to the reasonableness of its clauses.**

2. **A composition deed between partners who carried on business as engineers, and their creditors, assigned the partnership property and their separate estates to trustees for the benefit of the creditors, with power to postpone the sale and conversion of the premises assigned, and to employ all or any part of the joint estate, and to carry on the business for such period as they should think fit, and to make advances out of the joint estate or the proceeds thereof, and to employ the partners or either of them to assist in carrying on the business; and it was declared that the trustees should be indemnified out of the joint and separate estate by the creditors, in proportion to the amount of their respective debts, against all transactions and personal engagements, matters and things which they should lawfully do, enter into, or order in or concerning the management or conduct of the business. Held, that the indemnity clause imposed a personal liability on non-assenting creditors beyond the funds of the estate, and therefore the deed was not within Sect. 192.**

*Bankruptcy
Act, 1861,
24 & 25 Vict.
c. 134. s. 192.*

*Composition
deed.*

*Power to carry
on business.*

*Indemnity
clause.*

THIS was an interpleader issue in which a special case for the opinion of this Court was stated under the order of a Judge.

On the 27th *October*, 1866, the defendant issued out of this Court a writ of fieri facias in execution of a judgment which had been recovered by him against *I. Dodds* and *T. W. Dodds*, who were then carrying on an extensive business in copartnership as engineers and machinists at *Rotherham*, in *Yorkshire*. On the 28th *October* the sheriff entered on their premises and seized a portion of the stock in trade of the copartnership to the value of 212*l.*, being the amount endorsed on the writ.

The sheriff continued in possession under the writ, and on the 1st *December*, 1866, *I. Dodds* and *T. W. Dodds*, finding that they could not meet the demands of their

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creditors, executed a deed of assignment of all their property, real and personal, including that which had been seized by the sheriff, to the plaintiffs as trustees on behalf of all their creditors, including the defendant.

The deed was duly executed by *I. Dodds* and *T. W. Dodds*, and by the plaintiffs as trustees, and was assented to in writing by a majority in number of the creditors, both joint and separate, representing three-fourths in value of the creditors whose debts respectively amounted to 10*l.* and upwards.

The plaintiffs immediately on the execution of the deed took possession of the works and all other the property which had belonged to *I. Dodds* and *T. W. Dodds*, and gave notice to the sheriff of the execution of the deed and of their claims to the property seized. On the 26th *December* the deed was duly registered, having been first duly stamped, and all the requirements of The Bankruptcy Act, 1861, with respect to deeds of assignment and composition were duly observed.

The deed, which formed part of the case, was made between *I. Dodds* and *T. W. Dodds* of the first part, the trustees of the second part, all the joint creditors of *I. Dodds* and *T. W. Dodds* of the third part, all the separate creditors of *I. Dodds* of the fourth part, and all the separate creditors of *T. W. Dodds* of the fifth part: After reciting, among other things, that a majority in number representing three-fourths in value of the creditors, both joint and separate, whose debts respectively amounted to 10*l.* and upwards, had agreed to execute to *I. Dodds* and *T. W. Dodds* the release after contained, *I. Dodds* and *T. W. Dodds* assigned all their real and personal estate and all engines, machinery, plant, stock in trade, &c., to the trustees. The deed contained, among

others, trusts for the sale of the joint and separate property, and for the application of the monies arising therefrom, and for the division of the residue of the separate and joint estates of the two partners among the separate and joint creditors respectively rateably in proportion to the amounts of their respective debts. Provided always that, notwithstanding the trust for sale and conversion thereinbefore contained, it should be lawful for the trustees to postpone the sale and conversion of the whole or any part of the premises assigned, and in the meantime to employ all or any part of the joint estate of the two partners, and to carry on the business which they had carried on for such period as the trustees should think fit in the same manner and as fully in all respects as the two partners might have done if they had continued solvent, and for such purpose to make such advances out of the joint estate or the proceeds thereof as to them should seem expedient, and at any time after the business should have been so carried on to enter into any contract or agreement with any purchaser or purchasers for the absolute sale of such part of the trust premises as should have been employed in the conduct or management of the business, together with the goodwill of the business, for such price and upon such terms as to credit or otherwise as to them should seem expedient, and with power to employ the partners or either of them or any other persons to assist in managing and carrying on the business or in realizing the premises assigned. "And it is hereby agreed and declared by and between the said parties hereto that the said trustees or trustee shall be indemnified, protected and saved harmless by or out of the joint and separate estates and effects of the

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said *I. Dodds* and *T. W. Dodds*, and each of them, or otherwise, by the creditors according and in proportion to the amount of their said respective debts against or in respect of all transactions and personal engagements, matters and things whatsoever which they or any of them shall lawfully do or cause to be done, or enter into or order or direct in or concerning the management or conduct of the businesses of the said *I. Dodds* and *T. W. Dodds* by virtue of or in pursuance of these presents, and that they the said creditors, and every of them, their and his heirs, executors, administrators and assigns, shall and will from time to time and at all times allow and confirm the same in all respects." Provided always that the separate estates and creditors should not be liable to pay or make good the losses or expenses of the trustees in the conduct, management, sale or conversion of the joint estate, and the joint estate and creditors should not be liable to pay or make good the losses or expenses in the collection, sale or conversion of the separate estates. The deed contained a declaration that it was intended to operate as a deed under sect. 192 of the Bankruptcy Act, 1861, and that the joint and separate estates should be applied and administered as under a bankruptcy of *I. Dodds* and *T. W. Dodds* and as though they had at the date thereof been duly adjudged bankrupts, and concluded with a release by each class of creditors of *I. Dodds* and *T. W. Dodds* from their respective debts.

The question for the Court was, whether under the deed the plaintiffs, as trustees, were entitled as against the defendant, the execution creditor, to the property seized.

Manisty, for the plaintiffs.—A business of this sort could not be wound up under sect. 192 of The Bankruptcy Act, 1861, 24 & 25 *Vict.* c. 134., without a power to carry on the business, and trustees could not be found to carry it on unless clauses indemnifying them were inserted in the deed. In *Bailey v. Bowen* (a) a deed of inspectorship which authorized the inspectors to require the debtor to enter into new contracts for the purpose of winding up the estate and to advance him money to enable him to carry out such contracts, was held valid; as the reasonableness of the provisions is a matter for the consideration of the creditors. The authority given to the trustees to carry on the business and enter into contracts for that purpose implies the liability of the creditors to indemnify them against losses incurred in the management of it. Such a covenant as this is necessarily incidental to the winding up of the estate and does not alter the character of the deed. *Woods v. Foote*, in error (b), and *Nicholson v. Potts*, cited in *Balden v. Pell* (c) may be relied on, but in those cases the covenant to indemnify the debtor and his estate from actions against outstanding bills of exchange introduced inequality among the creditors. [*Blackburn J.* A deed of arrangement under sect. 192 does not make the creditors partners with the trustees; *Cox v. Hickman* (d).]

R. G. Williams, for the defendant.—A deed which imposes an unlimited personal liability on non-assenting creditors is not within sect. 192 of stat. 24 & 25 *Vict.* c. 134. In bankruptcy the assignee could only look for

(a) 8 B. & S. 734.

(b) 1 H. & C. 841.

(c) 5 B. & S. 213. 225-6.

(d) 8 H. L. C. 268.

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indemnity to the estate. This deed is not limited to winding up the business by means of the estate itself: all the creditors are made to enter into a covenant to indemnify the trustees to an indefinite amount. The deeds in *Strick v. De Mattos* (a), *Bailey v. Bowen* (b), and *Coles v. Turner* (c), reversed in error (d), did not contain such a covenant as this. In *Woods v. Foote*, in error (e), *Wightman J.* said, p. 849, "A covenant by which a creditor is bound to indemnify the debtor against liabilities of an unknown and uncertain amount, whether arising from the failure of the acceptor or the indorsees, is utterly unreasonable." A covenant to indemnify confined in its operation to the creditors executing or assenting to the deed would have avoided this objection. [*Lush J.* This covenant binds creditors below 10*l.* though they have no voice in assenting to or dissenting from the deed. *Mellor J.* And a non-assenting creditor who might be willing to give up his debt.] Even secured non-assenting creditors might be made liable. [He also cited *Legg v. Cheesebrough* (f), *Lyne v. Wyatt* (g), *Dell v. King* (h).]

Manisty, in reply.—Suppose the deed had been made with the creditors without the intervention of trustees, this liability would have been the necessary consequence of carrying on the business. [*Blackburn J.* It would be impossible to carry on and wind up the business except by a small number of persons, whether called trustees, inspectors, or by some other name. Would not a power to raise additional capital for carrying on

(a) 3 H. & C. 22.

(c) 18 C. B. N. S. 736.

(e) 1 H. & C. 841.

(g) 18 C. B. N. S. 593.

(b) 8 B. & S. 734.

(d) H. & R. 386.

(f) 5 C. B. N. S. 741.

(h) 2 H. & C. 84.

the business be beyond the purpose of winding it up?] The Court will give credit to the trustees as men of business in winding it up for the benefit of the creditors.

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BLACKBURN J. The question is a very important one, and has been very well put before us; but it lies in an extremely small compass, and we should gain nothing by taking further time for consideration.

The 192nd section of stat. 24 & 25 *Vict. c.* 184., which enacts that every deed between a debtor and his creditors, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, "or the distribution, inspection, management and winding up of his estate, or any of such matters," shall be binding on all the creditors, subject to certain conditions. The deed in the present case relates to the winding up and management of the debtor's estate; and for the purpose of winding up the estate outstanding contracts must be completed and there must be a power of entering to a certain extent into new engagements. The cases on this section, the last being *Bailey v. Bowen* (a), decide that the trustees have a right to apply the funds of the estate in defraying the reasonable expenses of such contracts. So that a deed which authorises the employment of the whole of the estate in carrying on the business for the purpose of winding it up is within the purview of the section provided the required majority of the creditors execute or assent to it. In the present case the deed goes much farther: it not only gives power to the trustees to apply the whole of the estate to the carrying on of the debtor's business, but contains a clause by which, if the trustees

(a) 8 B. & S. 734.

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NICHOLSON. incur liabilities beyond what the estate can meet, all the creditors as well those above as those below 10 $\frac{1}{2}$ are in proportion to the amount of their respective debts liable to indemnify them against all transactions and personal engagements which they have entered into concerning the management and conduct of the business of the debtors. So that in the event, by no means improbable, of the whole estate being spent and the trustees being out of funds, the non-assenting creditors would be obliged to furnish further funds out of their own pockets besides losing their debts. That is beyond the words and meaning of the Act. A deed which attempts to bind not merely assenting creditors and the debtor's estate, but non-assenting creditors, and to force them to enter into speculations which may result in losing their debts and paying money out of their own pockets, attempts more than the Act authorises the majority of the creditors to do. On this ground the deed is not good, and our judgment must be for the defendant. We do not inquire whether the provision in the deed is reasonable. That is a matter for the discretion of the creditors.

MELLOR J. Since the passing of stat. 24 & 25 *Vict.* c. 134. there have been fluctuating opinions as to what is a reasonable provision in deeds under the 192nd section. But it is now settled that the Courts will not overrule the decision of a statutable majority of the creditors as to what is reasonable. If the deed is within the purview of the Act the Courts will not interfere with it upon the question of the reasonableness of its clauses. Still we have to see whether it is such a deed. A priori it is not likely that the Legislature should entrust to the majority of the creditors a greater

power than that of dealing with the estate, and before I can say that a deed giving them more is valid, I must be satisfied that the statute authorizes it. There are no such words in sect. 192. The liability imposed by this deed on the non-assenting creditors may be very much beyond the estate of the debtors, and therefore it is not good.

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LUSH J. It is clear to my mind that when the Legislature entrusted the majority of the creditors with the power of dealing with the debtor's estate, they were not to have power to make arrangements which might impose on non-assenting creditors a liability over and above the loss of their debts.

Judgment for the defendant.

LORD *against* LEE.

Monday,
April 27th.

1. The Common Law Procedure Act, 1854, 17 & 18 *Vict.* c. 125. s. 15. applies to references by consent as well as those under a compulsory order.

2. The plaintiff and defendant agreed in writing, on the 8th *August*, 1866, to refer all matters in dispute between them to an arbitrator. The agreement did not limit any time for making the award. The arbitrator entered on the reference at once, but did not make his award within three months after. Afterwards a Judge made an order enlarging the time for making the award; and the plaintiff took up the award within the time so enlarged. In an action upon the award: Held, that the Judge had power to make the order under The Common Law Procedure Act, 1854, 17 & 18 *Vict.* c. 125. s. 15., and that its effect was to ratify the act of the arbitrator; and therefore the action was maintainable.

3. *Quære*, per *Blackburn J.* If at a meeting held after the time had expired perjury were committed, whether an indictment could be maintained?

4. *Quære*. Whether the Judge's order enlarging the time must not be made before an action can be brought on the award?

Award.
Enlargement
of time.
Judge's order.
Common Law
Procedure Act,
1854, 17 & 18
Vict. c. 125.
s. 15.
Ratification.

DECLARATION for money payable under an award.

Plea. Never indebted. Issue thereon.

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On the trial, before *Mellor J.*, at the *Middlesex* Sit-
tings after *Trinity* Term, 1867, it appeared that on the
8th *August*, 1866, the plaintiff and defendant signed
a written agreement to refer all matters in dispute
between them to an arbitrator. The agreement did not
limit any time for making the award. The arbitrator
entered on the reference at once, and on the 17th *Janu-
ary*, 1867, made his award and gave notice that it was
ready. The submission was afterwards made a rule
of Court. On the 1st *March* a summons was taken
out by the plaintiff to enlarge the time for making
the award, and on the 11th *March* an order was made
by *Cockburn C. J.* that "the time for the arbitrator to
make his award herein be enlarged till the 15th *March*
instant." On the 14th *March* the plaintiff took up the
award. The learned Judge directed a verdict to be
entered for the plaintiff, reserving leave to move to enter
the verdict for the defendant.

In *Michaelmas* Term, *Montagu Chambers* obtained a
rule nisi accordingly on the ground that the Court or
a Judge had no power to enlarge the time for making
the award after the award had been made.

The Common Law Procedure Act, 1854, 17 & 18
Vict. c. 125. s. 15., enacts: "The arbitrator acting under
any such document or compulsory order of reference as
aforesaid, or under any order referring the award back,
shall make his award under his hand, and (unless such
document or order respectively shall contain a different
limit of time) within three months after he shall have
been appointed, and shall have entered on the reference,
or shall have been called upon to act by a notice in
writing from any party, but the parties may by consent
in writing enlarge the term for making the award; and
it shall be lawful for the superior Court of which such

submission, document, or order is or may be made a rule or order, or for any Judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month."

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Denman and *Willoughby* shewed cause. — First. Reference by consent is not within stat. 17 & 18 *Vict.* c. 125. s. 15., which refers to compulsory orders of reference; and therefore the arbitrator was not bound to make his award within three months. [They cited *Watson v. Bennett* (a).] [*Blackburn J.* Sect. 15 is in a class of sections which refer to all references, not only to those under a compulsory order. The words are, "The arbitrator acting under any such document" (that is, "any document authorizing the reference," "or compulsory order of reference as aforesaid." On sect. 7 a conceivable argument might be raised, but not on sect. 15. There is nothing in *Watson v. Bennett* to justify a doubt whether sect. 15 applies to orders of reference made by consent.]

Secondly. The time for making the award was legally enlarged by the order. In *Browne v. Collyer* (b) *Wightman J.* made an order under stat. 3 & 4 *W.* 4. c. 42. s. 89. enlarging the time after the award had been made. In *Re the arbitration between Ward and The Secretary of State for the War Department* (c), where the arbitrator had exceeded his power of enlarging the time and made an award within the enlarged time, but after the time limited for the exercise of his power,

(a) 5 *H. & N.* 831.(b) 2 *L. M. & P.* 470.(c) 32 *L. J. Q. B.* 53.

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the Court upheld a similar order. [He also cited *Watson v. Beavan* (a).] In *Mason v. Wallis* (b), which was before stat. 3 & 4 W. 4. c. 42., the enlargement of the time by the arbitrator was not authorised by the terms of the order of reference. The omission in this order of a statement of "good cause" is a mere irregularity, *Re Burdon* (c); and therefore that objection cannot now be taken.

Montagu Chambers, Joyce and Bush Cooper, in support of the rule.—First. Stat. 17 & 18 Vict. c. 125. s. 15. when read with the preceding sections includes a reference by consent as well as a compulsory reference.

Secondly. The Court or a Judge has no power to enlarge the time for making an award after it has been made. As the arbitrator had no authority when the order was made, *Mason v. Wallis* (d), per *Bayley J.*, the award was a nullity, and the subsequent order cannot make it good. [*Mellor J.* The arbitrator can do no act beyond the terms of the agreement of reference; but the power of the Judge depends on the statute.] In *Reid v. Fryatt* (e) the award was made after the order enlarging the time, and therefore held good; it would have been otherwise if made before the order. In *Browne v. Collyer* (f) *Wightman J.* enlarged the time, but did not determine whether the award which had been made was a nullity or not. In *Re the arbitration between Ward and The Secretary of State for the War Department* (g) *Cockburn C. J.* and *Blackburn J.* did not enter into the reasons of *Wight-*

(a) 8 W. R. 612.

(b) 10 B. & C. 107.

(c) 27 L. J. C. P. 250.

(d) 10 B. & C. 107. 109.

(e) 1 M. & S. 1.

(f) 2 L. M. & P. 470.

(g) 32 L. J. Q. B. 53.

man J. in *Browne v. Collyer*. [*Blackburn J. Wightman J.* was a party to the decision in the later case, and the tenor of the reasoning of the other Judges is that the award was good. *Mellor J.* The Court has frequently enlarged the time after the time limited for making an award has elapsed.] That is when the arbitrator had not exhausted his powers and made his award. Further, the order has the effect of a new submission, and therefore the arbitrator should have heard the witnesses again or at least have made a new award. Would the order validate meetings held after the time had expired so as to support an indictment for perjury? [*Blackburn J.* I am unwilling to say that perjury could not be committed by witnesses at those meetings; but we will not decide that until the question arises. Suppose before stat. 9 & 10 *W. 3. c. 15.* meetings had been held after the time had expired, and while the arbitrator was considering his award the parties made a fresh submission and agreed that they would take up the award, that would be a ratification of what had been done without authority.] Ratification is by a person who is a volunteer, and knows the consequences of his act and whether they will be mischievous; but if a Judge's order ratifies an award made without power, it would have the effect of taking away from a defendant his defence to an action brought for enforcing the award. [*Blackburn J.* It may be that the order must be made before an action is brought on the award. The Judge has power to insert such terms in the order as shall protect the opposite party under the altered circumstances. *Mellor J.* Suppose a plea pleaded after the time to plead expired and the time enlarged.] Or a judgment signed after the time. [*Denman* cited *Tyerman v. Smith (a).*]

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(a) 6 *E. & B.* 719.

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BLACKBURN J. The discussion has cleared the matter and enabled us to arrive at a satisfactory conclusion. I think the true construction of this part of the 15th section of The Common Law Procedure Act, 1858, 17 & 18 *Vict. c. 125.*, is that the Court or a Judge may at any time give such further time as he thinks fit to the arbitrator for making his award as if it had been originally given in the agreement or order of reference; so that if the time originally limited was six months, and the Court or a Judge gave six months more, it is the same as if twelve months had been written in the original submission; and the effect of the order is to make valid any step taken within the enlarged time. Look at the nature of an arbitration and the position of an arbitrator before the statutes relating to arbitrations. Two parties agreed to give authority to an arbitrator to settle a matter in difference between them, and when he had given his decision the matter was settled; but the authority conferred upon him was subject to revocation by the death or by the will of either of the parties; and, even though bound by a covenant not to revoke the authority, the party revoking was only liable to an action for breach of covenant. Now at common law when an act is done by a person *animo agendi*, that is, professing to act for another, the person whose authority to do the act was assumed may, subject to a few exceptions which do not affect the present case, ratify the act, and his ratification is equivalent to a previous authority. If a servant professing to act with the authority of *A.* does that which amounts to a trespass, and *A.* afterwards assents to and adopts his act, it is deemed to have been done by *A.*'s previous sanction and renders him liable to an action. So if an arbitrator omits to enlarge the time

limited for making his award and makes his award after the time has expired, he purports to act with the authority given to him, and though his award is not enforceable, and void, yet the parties may ratify it by agreeing that the time shall be enlarged or otherwise, and then it is the same as if the award had been made under the original authority. And an enlargement of the time is not a fresh submission but the ratifying of an act which purported to be done under the original authority. Since stats. 9 & 10 *W.* 3. c. 15. and 3 & 4 *W.* 4. c. 42. the ratification must be such as will come within their provisions, and therefore must generally be in writing. Sect. 39 of the latter statute enacts that the authority of an arbitrator shall not be revocable by any party to the reference without the leave of the Court or a Judge; and attached to the section is a clause similar to that which we are now considering in sect. 15 of The Common Law Procedure Act, 1854. There was at first some doubt whether the power to enlarge the time given by stat. 3 & 4 *W.* 4. c. 42. s. 39. was confined to cases where there had been an attempt to revoke the authority of the arbitrator, and whether the enlargement must not have been made during the time within which the arbitrator might have enlarged it. But to hold that the power of enlarging was so confined would have baffled the object of the Act, because the exercise of the power by the Court or a Judge would be rarely needed, except where the arbitrator had omitted to enlarge the time; and this was so decided (*a*). Then The Common Law Procedure Act, 1854, sect. 15, gives power to the parties by consent in writing to enlarge the time. This is a beneficial power, and when

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(*a*) See *Leslie v. Richardson*, 6 C. B. 378.

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exercised it must have the same effect as on a parol submission at common law. The same construction must be put upon the clause giving power to the Court or a Judge "to enlarge the term for making the award," notwithstanding the parties do not consent, so that the original submission shall be read as if it stated that the arbitrator should make his award within a time which would expire with the time mentioned in the order. This construction obviates all the difficulties. The section says that a Judge shall in his discretion have the same power as the parties had at common law to ratify the act of the arbitrator as if the extended time had been originally inserted in the submission; therefore the award made in the interval is rendered good. The evils of an opposite construction are obvious. Where the arbitrator inadvertently omits to enlarge the time and meetings are held in the interval before the omission is discovered, if the enlargement of the time had the effect only of a new submission the witnesses must be recalled and all the expense incurred over again. The section enables a Judge to cure a defect of form and not of substance which, if found out in time, the parties themselves might have cured.

Few of the cases have any bearing on the present. In *Mason v. Wallis* (a), which was before stat. 3 & 4 W. 4. c. 42., the terms of the order of reference required a Judge's order confirming the enlargement of the time by the arbitrator: the arbitrator enlarged the time; but there was no Judge's order, and therefore the enlargement was bad. In *Reid v. Fryatt* (b) the decision was that the award was good, the time having been previously enlarged by the order of a Judge; but there is no

(a) 10 B. & C. 107.

(b) 1 M. & S. 1.

intimation by the Court that if the award had been made before the Judge's order they would have come to a different conclusion. The two cases of *Browne v. Collyer* (a) and *Re the arbitration between Ward and The Secretary of State for the War Department* (b) do not go so far, because in the former the late Mr. Justice *Wightman* enlarged the time, leaving the question of the validity of the award to be decided in an action, and in the latter, the time having been enlarged, the Court were asked to set aside the order, and without deciding the main question refused to interfere in a summary manner. There could be no appeal against those decisions. But the Judges in both cases thought that the right construction of the 15th section of the statute was that which we are adopting. Consequently the authorities, so far as they go, are in favour of the plaintiff. Therefore, on principle and the right construction of sect. 15 of The Common Law Procedure Act, 1854, I am of opinion that this rule should be discharged.

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MELLOR J. I agree with the reasons given by my brother *Blackburn*. When we consider the circumstances under which references proved abortive at common law, we find that the course of legislation has been to render the powers of arbitrators more effectual for deciding cases, and to prevent arbitrations from failing through the mistake or inadvertence of the arbitrator. As to the construction of The Common Law Procedure Act, 1854, sect. 15, on which the present case turns, the form of expression shews that the object was to put the parties and the arbitrator in the same position as if the original time mentioned in the sub-

(a) 2 L. M. & P. 470.

(b) 32 L. J. Q. B. 53.

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mission comprehended the time to which it was enlarged by the order, so that during the whole of the time so extended the arbitrator should be clothed with all the jurisdiction conferred on him by the submission. The contrary construction would fritter away the benefit of the enactment.

LUSH J. This point has now for the first time directly arisen, but we are assisted by the decisions on stat. 3 & 4 *W.* 4. c. 42. s. 39., which is in *pari materiâ* with The Common Law Procedure Act, 1854, sect. 15. By this latter section no limit is fixed to the time within which a Judge may make an order enlarging the time, even though the submission contains a clause limiting the time within which the arbitrator should make his award. Therefore the power of the Judge to enlarge the time cannot be affected by the arbitrator having in the meantime done an act which he had no power to do, such as making what purports to be an award. Then what is the effect of the order when made? Has it the effect of a new submission so that the arbitrator must start afresh from the position in which he was when the order was made; or does it add the intermediate period to the original time and make it the same as if the submission had given the time originally limited plus the enlarged time? We cannot hold the former construction, for the consequence would be that if the arbitrator held meetings and examined witnesses after the time expired, and then discovered that he had inadvertently omitted to enlarge the term, the expense of the meetings so held and of the witnesses examined must be incurred over again, without the least advantage to either party. If any

injustice or wrong would be done by such an order the Judge would not make it. Therefore I have no difficulty in giving the latter construction to the section. The defendant's counsel indeed argued that the words of the section by necessary implication refer to something done after the order for enlarging the time has been made, but the words are not "to enlarge the time within which the award may be made," but "to enlarge the term for making the award:" they imply one continuous time within which the arbitrator has authority. I am confirmed in this conclusion because on a reference at common law the parties themselves might ratify the act of an arbitrator done without authority, and the object of this enactment is that where the parties decline to give him jurisdiction the Judge shall be enabled for good cause to do in invitum what they might have done.

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Rule discharged.

WATKIN *against* HALL.

 Tuesday,
April 28th.

1. The repetition of a rumour injurious to another is actionable unless the occasion rendered it privileged.

2. It is no justification that the rumour existed.

3. Since The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. s. 61., a count in libel or slander setting out the words with an innuendo may be read as two counts, one with the innuendo and the other without it, and proof of either is sufficient.

4. Declaration in slander alleged that the defendant spoke of and concerning the plaintiff as chairman and director of *The S. E. Railway Company*, and of and concerning a fall in the market value of the shares in that Company, and of and concerning a rumour assumed by the defendant to have existed and been circulated, the words following, "You have heard what has caused the fall" (meaning thereby the fall in the market value of the shares in *The S. E. Railway Company*), "I mean the rumour about the *S. E.* chairman having failed" (meaning thereby that the plaintiff being chairman and director of *The S. E. Railway Company* was insolvent). Plea, that in speaking the words the defendant meant and was understood by the bystanders to mean that there was a rumour current on the Stock Exchange about the chairman of *The S. E. Railway*

Slander.
Repetition of
rumour.
Common Law
Procedure Act,
1852, 15 & 16
Vict. c. 76.
s. 61.
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Company having failed, and not that the plaintiff was insolvent as in the innuendo alleged : and that there was a rumour on the Stock Exchange about the chairman of *The S. E. Railway Company* having failed. Held on demurrer that the plea was bad.

THE declaration stated that the plaintiff was the chairman and a director of a railway Company established by Act of Parliament, to wit, *The South Eastern Railway Company*, for reward and salary to the plaintiff in that behalf, and was also the chairman and a director of a certain other railway Company established by Act of Parliament, to wit, *The Manchester, Sheffield and Lincolnshire Railway Company*, also for reward and salary to him in that behalf, and then was also the chairman and a director of *The Grand Trunk of Canada Railway Company*, also for reward and salary to him in that behalf, and was a holder and proprietor of a large quantity of shares of great value, and was otherwise interested in the several Companies and the concerns and affairs thereof respectively, and in the welfare and prosperity thereof respectively, and devoted and gave much of his time and attention to their management and business and greatly occupied himself therewith, and thereby acquired great gains. That shortly before the committing of the grievances mentioned a fall in the market value of the shares in *The South Eastern Railway Company* had occurred and taken place. And the defendant falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him as such chairman and director of *The South Eastern Railway Company*, and of and concerning him in his connexion with that Company and of his position therein, and of and concerning the fall in the market value of the shares in that Company, and of and concerning a rumour assumed

by the defendant to have existed and been circulated respecting the plaintiff and respecting his pecuniary position and solvency, and of and concerning the premises the words following, that is to say, "You have heard what has caused the fall" (meaning thereby the fall in the market value of the shares in *The South Eastern Railway Company*), "I" (meaning the defendant) "mean the rumour about the *South Eastern* chairman having failed" (meaning thereby that the plaintiff so being such chairman of *The South Eastern Railway Company* and such director of the Company had become embarrassed in his pecuniary affairs and had become and was insolvent), whereby &c. (alleging special damage).

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Plea. That in speaking the words in the declaration mentioned, the defendant meant and was understood by the bystanders to mean that there had been and there was a rumour current on the Stock Exchange about the chairman of *The South Eastern Railway Company* having failed, and not that the plaintiff had become embarrassed and had become and was insolvent as in the innuendo in the declaration alleged; and that it was true that there had been and there was a rumour current on the Stock Exchange about the chairman of *The South Eastern Railway Company* having failed (a).

Demurrer, and joinder.

(a) In *Trin.* Term, 1867, *Beasley* moved for a rule under The Common Law Procedure Act, 1852, 15 & 16 *Vict.* c. 76. s. 52., calling upon the defendant to shew cause why the above plea should not be struck out as being an immaterial traverse, and tending to embarrass the fair trial of the action; *Hancock v. Noyes* (9 *Exch.* 388). The plaintiff would be bound to prove that he uttered the words in the sense assigned to them by the innuendo; *Bembridge v. Latimer* (12 *W. R.* 878, 879), per *Erle* C. J. [He also cited *Hemmings v. Gasson* (*E. B. & E.* 346).] [*Blackburn J.* The innuendo may be rejected, the declaration being good without it. The Common Law Procedure Act, 1852, s. 61., makes

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The Common Law Procedure Act, 1862, 15 & 16 *Vict.* c. 76. s. 61., enacts, "In actions for libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to shew how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, shew a cause of action, the declaration shall be sufficient."

Beasley, who appeared for the plaintiff, was stopped.

Holl, for the defendant.—First. "When the defendant admits the publishing or speaking of the libel or words as stated, but justifies so doing because they are true, he must plead this matter specially; for he will not be permitted to give it in evidence upon the general issue. But where the defence is, that the libel or words were published or spoken, not in the malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion which warranted the publication, this matter may be given in evidence under the general issue, because it proves that the defendant is not guilty of the malicious slander charged in the declaration;" note (1) to *Lake v. King* (a). The plea alleges that the words

(a) 1 *Wms. Saund.* 120. 130, 6th ed.

the plea divisible. I doubt whether the plea is good; but the plaintiff may demur and also take issue on it.]

PER CURIAM. (COCKBURN C. J., BLACKBURN and MELLOR JJ.)

Rule refused.

were not meant and understood in the sense put upon them by the innuendo, and that in the sense in which they were meant and understood they were true. [*Blackburn J.* Suppose the innuendo struck out of the declaration, is not an idle repetition of a statement that a person has failed as injurious as an assertion that he has failed?] In *M'Pherson v. Daniels* (a) the action was for words imputing a direct assertion by the defendant that the plaintiff was insolvent. It would be very inconvenient that every person who mentioned a rumour should be liable to an action. [*Blackburn J.* It is sufficient that the words were spoken wantonly : a malicious intention does not make them more actionable.]

Secondly. The plea is good as amounting to the general issue. In *Brembridge v. Latimer* (b) *Willes J.* said that the last clause in sect. 61 of The Common Law Procedure Act, 1852, 15 & 16 *Vict. c. 76.*, made no difference in the old laws of pleading and evidence, and that "the plaintiff must always sustain the cause of action of which he had complained, and not abandon it by an allegation that certain words would have been actionable if the declaration had been framed in a different manner." The true rule is that the plaintiff may set forth the words without alleging any meaning, and allow the jury to draw inferences, and if the defendant justifies he must take on himself the condition that if the plaintiff alleges that the words have a particular sense he is bound by it, subject to an amendment being allowed by the Court. [*Lush J.* That is not consistent with the last clause of sect. 61.] It would be a great inconvenience and would mislead the defendant if after a plaintiff had alleged a particular meaning he might

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(a) 10 *B. & C.* 263.(b) 12 *W. R.* 878, 879.

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Beasley was not called upon to reply.

BLACKBURN J. The only real questions are, whether an action will lie for stating, not on an occasion which would make the statement privileged, that there was a rumour on the Stock Exchange or elsewhere that the plaintiff, being a trader, had failed, and whether it is a justification that the rumour did exist and that the defendant did not invent but only repeated it without expressing his opinion whether it was false or true.

As to the first question: the general rule is that an action for defamation lies where the words are such as a person has no right to repeat and such as may be injurious to another, and either actual damage accrues or the law concludes that it would follow, as from words spoken of another in the way of his trade, or from words which impute an indictable offence. In the latter case the law in former times imputed damage from the possibility of the repetition of the rumour influencing a grand jury. Again, words imputing to another that he has a contagious disease are actionable, because they would deter persons from associating with him. So, to say of a cattle dealer that the cattle disease is among his cows would be actionable because injurious to him in his trade. In all these instances the person making the injurious statement is liable to pay damages, for the law implies malice from the fact of stating that which is injurious to another without sufficient reason for it. If however the defendant proves that the occasion justified or excused the statement *implied* malice is negatived, and malice *in fact* must be proved by the

plaintiff. But upon the pleadings in the present case there is no pretence that the circumstances excused the repetition of the rumour.

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As to the second question, I do not know a better exposition of the law upon this point than the judgment of *Littledale J.* in *M'Pherson v. Daniels* (a),—"A defendant, by shewing that he stated at the time when he published slanderous matter of a plaintiff, that he heard it from a third person does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not shew that the slander was published on an occasion, or under circumstances which the law, on grounds of public policy, allows. Nor does it shew that the plaintiff has not sustained, or is not entitled in a Court of law to recover, damages. As great an injury may accrue from the wrongful repetition, as from the first publication of slander, the first utterer may have been a person insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a Court of law for injurious matter published concerning him, because another person previously published it. That shews not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a Court of law, but that he has been wronged by another person as well as the defendant." I adopt these words as expressing in good and accurate language what is in my mind. In the present case the injurious words being spoken by the defendant under circumstances which did not justify or excuse them, the fact that others had spread the report before does not disentitle the plaintiff to recover dama-

(a) 10 B. & C. 263. 272-3.

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ges. Whether one farthing would be sufficient or the damages should be very large is a question for the jury to decide, the rumour being such as must be mischievous to a person in trade.

There is another point: that, as the declaration contains an innuendo that the defendant intended to impute that the plaintiff had actually become insolvent, the plea, which denied that the words were spoken in that sense, amounted to the general issue, and the latter part of the plea, that there had been a rumour on the Stock Exchange, was not required and was surplusage. Before the alteration in the law by The Common Law Procedure Act, 1852, 15 & 16 *Vict. c. 76. s. 61*, whenever an innuendo was supported by a prefatory averment shewing the words to have been used in the particular sense it must have been proved as laid; slander of a different character could not be shewn. Where it was not supported by the prefatory averment it might be rejected, and then the plaintiff might stand simply on the words if they were injurious. Sometimes it was not easy to frame a declaration to meet this state of the law, which was a trap for nonsuits; and therefore the Legislature enacted the provision in sect. 61. [His Lordship read it.] The effect of the first clause is, that an innuendo cannot be rejected as formerly because not supported by the prefatory averment. And the last clause enacts, that instead of a declaration with many counts, with as many innuendos, a count for libel or slander, with an innuendo that the words were used in a particular sense, may be read as two counts, one with the innuendo and the other without it; and proof of either is sufficient. It follows that the defendant may plead a justification to the count with the innuendo, and also to the count without it. The decision in

Brembridge v. Latimer (a) was right, because there the declaration set forth a portion of an article in a newspaper with an innuendo, and the defendant pleaded, among others, a plea setting out the whole article, and alleging that the part omitted in the declaration and set out in his pleas gave a different meaning to the alleged libel from that assigned to it by the declaration, and justifying the libel in the latter sense. The Court refused to allow this plea, as irrelevant to the libel complained of and embarrassing to the proper trial of the action. What my brother *Willes* said with reference to the circumstances of that case does not apply to the present.

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LUSH J. The defendant by his plea admits that he used the words set forth in the declaration, but in effect says that he is not responsible because there was the rumour which he repeated, and he did not say it was true, nor did he intend to convey the meaning averred in the declaration. Therefore he asserts the broad proposition that a person may circulate a rumour injurious to another provided he can prove that he did not invent it. That is a proposition which the law has always negatived. If he justifies he must shew either that he made the statement under circumstances which rendered it privileged, or that the substance of the injurious words is true.

The second ground is that, the innuendo being that the defendant meant to assert the fact that the plaintiff was insolvent, nothing short of that meaning will sustain the action; and therefore the plea which negatives it is good. But that would neutralize the 61st section of The Common Law Procedure Act, 1852,

(a) 12 W. R. 878.

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which intended to give to a declaration in libel or slander a double character, and to enable the plaintiff to maintain an action if the words themselves were actionable, whether the precise meaning ascribed to them by the innuendo were proved or not. It is not enough that that could not have been the meaning, or that the plaintiff has failed in proving that meaning, if the words used are capable of another meaning, which is libellous or injurious.

Judgment for the plaintiff.

Thursday,
April 30th.

The QUEEN *against* The Justices of WEST-
MORLAND.

Quarter
Sessions.
Power of
adjournment.
Notice.
Prison Act,
1865, 28 & 29
Vict. c. 126.
s. 24.
Alteration of
prison.
Consideration
of present-
ment.

The Prison Act, 1865, 28 & 29 Vict. c. 126. s. 24., enacts, that the consideration of a presentment of the necessity for an alteration or enlargement of a prison "shall not be entertained by the prison authority unless not less than three weeks previous notice has been given in some one or more public newspaper or newspapers circulating within the district of the prison authority of their intention to take the same into consideration at a time and place to be mentioned in such notice." By sect. 5, as respects a prison belonging to a county, the justices in Quarter Sessions are the prison authority. At an adjourned *Epiphany* Sessions for the county due notice was given that presentments of visiting justices as to the necessity of alterations in the two county gaols would be taken into consideration at the *Easter* Sessions. At those Sessions it was resolved to refer the question to the consideration of a committee, who were to report to the next *Michaelmas* Sessions. The committee made their report to those Sessions, who made an order accordingly. Held,

1. That the order was valid, because the Quarter Sessions had power to adjourn the matter from the *Easter* Sessions to the *Michaelmas* Sessions.

2. The resolution at the *Easter* Sessions being equivalent to an adjournment, a formal entry of it was not necessary.

3. A fresh notice that the presentments would be taken into consideration at the *Michaelmas* Sessions was unnecessary.

IN *Hilary* Term, *Staveley Hill*, on the part of the corporation of *Kendal*, obtained a rule calling upon the justices for the county of *Westmorland* to shew cause why a writ of certiorari should not issue to remove into this Court in order that the same might

be quashed an order of Sessions made at a General Quarter Sessions of the Peace held on the 17th *October*, 1867, ordering that the gaol at *Appleby* be altered and adapted in accordance with the provisions of The Prison Act, 1865, 28 & 29 *Vict. c. 126.*, and that sufficient cells be provided for the reception of the whole of the prisoners within the county.

At the *Midsummer* Sessions in 1866 for the county of *Westmorland* the clerk of the peace was directed to summon a meeting of the visiting justices of the two county gaols at *Appleby* and *Kendal*, and that they be requested to report as soon as possible as to the best means of applying the provisions of The Prison Act, 1865, 28 & 29 *Vict. c. 126.*

At an adjourned *Epiphany* Sessions holden at *Kendal*, on the 22nd *February*, 1867, two presentments of the county gaols at *Appleby* and *Kendal*, signed by more than three justices of the county, and having jurisdiction within the district of the prison authority of the county, were made to the Court. The first stated that "the provisions of The Prison Act, 1865, cannot be carried out at the above prison according to the existing arrangements thereof, and that it is necessary either to build a new prison for the county or materially to alter the above prison ; and they recommend that the said prison should be altered according to the plans prepared by the county surveyor so as to contain thirty-four separate cells for males and twelve cells for females, with the other requisites of the Act, or in such other way as shall be approved by the Court." The second stated that "the provisions of The Prison Act, 1865, cannot be carried out at the above prison according to the existing arrangements thereof, and that it is necessary to materially alter

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the above prison in order to comply with the provisions of the said Prison Act, 1865."

At the same Sessions it was ordered, "That the said presentments be taken into consideration at the *Easter* General Quarter Sessions to be holden at *Kendal* on *Thursday*, the 11th *April* next at 11.30 a.m.; that the said presentments be duly advertised by public notice in pursuance of the provisions of The Prison Act, 1865, sect. 24, and stating that it is intended to take the subjects therein mentioned into consideration at the time and place above mentioned."

The clerk of the peace duly published the presentments and a notice in accordance with this order in a newspaper circulating within the district of the prison authority for the county.

At the *Easter* Sessions, in *April*, 1867, the presentments were taken into consideration and several motions and amendments were made and moved and the Court divided thereon, and eventually it was resolved: "That a committee be appointed to consider the gaol question, to consult the government, and to report to the *Michaelmas* Quarter Sessions, 1867, upon the expediency of having one or two gaols, and that the committee consist of the following justices." [The names of seven justices followed.]

The affidavit of the clerk of the peace stated that these proceedings and resolutions were by special adjournment continued to the *Michaelmas* Quarter Sessions, 1867; but such special adjournment was not recorded by him, as by the practice of the Sessions no record of a special adjournment is directed to be entered of any matter which has to be reported to a subsequent Quarter Sessions by justices appointed for that purpose.

The usual notice was given by the clerk of the peace of the *October* Sessions to be holden at *Kendal*, but it did not appear from the notice that the subject-matter of the order was intended to be considered at those Sessions; nor was there any mention of or reference to it.

At the *Michaelmas* Sessions holden on the 17th *October*, the report of the Committee was produced and read, which recommended "that the gaol at *Appleby* be altered and adapted in accordance with the provisions of the New Prison Act, and that sufficient cells be provided for the reception of the whole of the prisoners within the county." Upon a motion that the report of the gaol committee be adopted and approved, it was objected that the resolution could not be voted upon that day, as an alteration of the gaols required that certain notices should be given in compliance with sect. 24 of The Prison Act, 1865.

The motion was eventually carried, and the order in question was made.

The Prison Act, 1865, 28 & 29 *Vict.* c. 126. enacts, sect. 5, "The persons hereinafter named shall be prison authorities for the purposes of this Act; that is to say,

"1. As respects any prison belonging to any county, except as hereinafter mentioned, or to any riding, division, hundred, or liberty of a county, having a separate Court of Quarter Sessions, the justices in Quarter Sessions assembled."

Sect. 24. "The necessity for any alteration or enlargement or for rebuilding of an existing prison, or for the building of a new prison, shall be proved, in the case of a municipal borough, by the certificate of the recorder, or chairman of Quarter Sessions where there

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is no recorder, and in any other case by a presentment of two or more of the visiting justices or other justices having jurisdiction within the district of the prison authority; and the consideration of such certificate or presentment shall not be entertained by the prison authority unless not less than three weeks previous notice has been given in some one or more public newspaper or newspapers circulating within the district of the prison authority of their intention to take the same into consideration at a time and place to be mentioned in such notice, and in every case the sanction of one of Her Majesty's Secretaries of State must be obtained to any such alteration, enlargement, rebuilding, or building."

Maule and Fawcett shewed cause.—The notice required by stat. 28 & 29 Vict. c. 126. s. 24. was given for the *Easter Sessions*, and when the Court is once seised of a matter it has the power of adjourning it, and no fresh notice is necessary for the subsequent Sessions. The Sessions had power to refer the matter to a committee of magistrates, and the taking into consideration their report is not an independent step but a continuation of the former proceedings. [He cited *Rex v. The Justices of Glamorganshire* (a), per Lord Kenyon.] Also the Sessions had power to respite the matter without adjourning the Session; *Keen v. Reg.* (b). If the adjournment ought to be recorded that may be supplied by amendment.

Manisty and Staveley Hill, in support of the rule.—This was a special subject not in the ordinary course of

(a) 5 T. R. 279. 282.

(b) 10 Q. B. 928.

the county business, and should have been adjourned to the *Midsummer* Sessions, and from them to the *Michaelmas* Sessions, so that the whole body of the magistrates attending the Sessions from time to time, who are a fluctuating body, might have notice what business was coming on at the next Sessions. The referring the matter at the *Easter* Sessions to a committee to report thereon at the *Michaelmas* Sessions was not in point of law an adjournment of the matter to those Sessions, nor was it notice that the report would then be taken into consideration. [*Cockburn* C. J. The practice of requiring special notice would hold out a premium to indolent magistrates not to attend the Sessions unless they were interested in the matter to be discussed. *Mellor* J. When a matter has been adjourned to the next Sessions for the purpose of information the inquiry may not be complete at those Sessions.] Then the consideration of it may be further adjourned. [*Blackburn* J. Such an adjournment is a mere form and not required by any statute.] The practice is to respite orders of removal to the next Sessions and to enter continuances. When this Court issues a mandamus to the Sessions to hear an appeal it directs them to enter continuances. [*Blackburn* J. That is not conclusive that it is a necessary step. *Mellor* J. The direction to enter continuances is on the assumption that their power to hear the appeal continues, which would not be the case if each Session were a distinct Court.] *Rex v. Grince* (a) is an authority that "the adjournment of a Sessions is not to be to a time beyond that fixed by 2 H. 5. c. 4." i. e. st. 1. c. 4. s. 2. "for the holding another original Sessions." [*Cockburn* C. J. That is an unsatisfactory report; it is a MS. report

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without any reasons (a).] [He also cited *Rex v. St. Michael, Ipswich* (b), *Rex v. Hedingham Sible* (c), *Bodmin v. Warligen* (d).] Stat. 41 G. 3. c. 23. s. 8. treats the Quarter Sessions as one separate Court: it enacts that if on appeal against a rate for the relief of the poor the Court of Quarter Sessions shall order the name of a person to be struck out or the sum assessed on him to be lowered; "and if it shall be made appear to the said Court" that he had paid money, in consequence of the rate, which he ought not, "the said Court," that is, the then existing Court, shall order it to be repaid to him with costs. [Blackburn J. Probably the Quarter Sessions could not adjourn such a special matter as that. Cockburn C. J. referred to *Rex v. Justices of Sussex* (e).]

COCKBURN C. J. This rule must be discharged. It appears that due notice was given as required by sect. 24 of stat. 28 & 29 Vict. c. 126. that the presentments would be taken into consideration at the *Easter* Sessions. At those Sessions it was resolved to refer the gaol question to the consideration of a committee of justices, who were to report to the *Michaelmas* Sessions. It is said that due notice should have been given that the question would come on at the *Michaelmas* Sessions because it was not the Sessions next following the *Easter* Sessions, and each Quarter Sessions is an original and independent Court. But that is not so with respect to a matter

(a) In 19 Vin. Abr., *Sessions of the Peace* (W.), p. 358, *Rex v. Grince*, MS. cases, is cited as deciding "that the justices cannot continue one general Sessions to a day subsequent to the time appointed by 2 H. 5. cap. 4. for the holding another original Sessions."

(b) 2 Bott P. L. pl. 975, 6th ed.

(c) *Id.* pl. 978.

(d) *Id.* pl. 982; S. C. nom. *Rex v. Inhabitants of Bodnyn, Burr.* S. C. 295.

(e) *Id.* pl. 1002.

which has once been before the Quarter Sessions, for it would lead to grievous inconvenience if they had not an inherent power to adjourn the consideration of business properly brought before them to a future time when they might be in a better position to decide upon it. But the best reason is that although stat. 17 G. 2. c. 38. s. 4. enacts that an appeal against a rate or assessment for the relief of the poor shall be "to the next General or Quarter Sessions of the peace," yet if the publication of the rate or assessment occurs so near the next Quarter Sessions that a reasonable notice of appeal cannot be given the Sessions are directed to adjourn the appeal, and in that case they are bound to enter and respite it to the next Sessions, and that Court becomes seised of and deals with it. This sanctions the position that a subsequent Quarter Sessions may take up a matter which has been respited at a former Sessions as though it had initiated it. And if the Court of Quarter Sessions have a right to adjourn the consideration of a particular matter it makes no difference whether the adjournment is to the next Sessions or one further off, although this Court would control their action if they capriciously adjourned a question to a distant Quarter Sessions. The decision in *Rex v. Justices of Sussex* (a) amounts to this, that there need not be a formal adjournment of a particular matter before that Court, provided something is done which is equivalent to it. In that case, on an appeal against an order of removal, the Quarter Sessions ordered a special case to be stated for the opinion of this Court, but inadvertently adjourned before counsel had

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(a) 2 Bott P. L. pl. 1002, 6th ed.

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settled the case. Upon an application to this Court for a mandamus to compel the justices to proceed in the appeal, this Court said that by ordering that a special case should be stated they virtually ordered that the appeal should be adjourned till the case was stated. So here, when the Quarter Sessions instead of determining the question before them resolved to refer it to the consideration of a committee to report to the next *Michaelmas* Sessions, that virtually amounted to an adjournment of the matter to those Sessions. I was at first struck with the objection that the resolution was merely that the committee should report to the next *Michaelmas* Sessions without adding that the matter should then be taken into consideration; but the resolution virtually amounts to that.

BLACKBURN J. Stat. 28 & 29 *Vict. c.* 126. *s.* 24. requires that before the consideration of a presentment for the enlargement of a gaol is entertained by the prison authority, not less than three weeks previous notice shall be given in one or more newspapers circulating within the district. Here the Quarter Sessions are the prison authority and due notice was given in the first instance for the *Easter* Sessions, who entertained the matter but did not dispose of it. It is obvious that if that Court had adjourned the consideration of the matter for two or three days continuously it would not have been necessary to give fresh notice, the adjournment being itself a sufficient notice. But the Court of Quarter Sessions is a continuing Court, not unlike one of the superior Courts at *Westminster*: it is one Court under one commission holding its sittings

four times a year. When the first Court is adjourned the next Court though sitting at a different time is the same Court, and, though the Sessions are not adjourned, if the question is adjourned the next Sessions may take it up. In *Keen v. Reg.* (a) *Patteson* J. said, p. 933, "The Sessions have only one commission ; so it is quite correct for the justices to adjourn a case from one Session to another because they are not advised what judgment to give." *Coleridge* J. said the same, and *Erle* J. pointedly, p. 934, "I think the Sessions are a continuing Court, and that they have power to adjourn a case from one Session to another." He also said that the case of *Bodmin v. Warligen* (b) is "no authority for holding that the Sessions cannot adjourn a case without also adjourning the Session." The question then is whether the prison authority, when they sat at the first Quarter Sessions in *January*, could adjourn the matter to the *Michaelmas* Quarter Sessions: they certainly might to the next, and I see no reason why the *Easter* Sessions should not be able to adjourn the consideration of these presentments to the *Michaelmas* Quarter Sessions. If this had been a dropped question there must have been a fresh notice before it could be taken up again; but they referred the consideration of it to a committee to report to the *Michaelmas* Sessions, which were the next but one; and that according to *Rex v. Justices of Sussex* (c) is, though not in words, an adjournment of the matter to those Sessions, and any justice having notice by advertisement that the matter was to be brought forward

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(a) 10 Q. B. 928.

(b) 2 Bott P. L. pl. 982; S. C. nom. *Rex v. Inhabitants of Bodmyn*, Burr. S. C. 295.

(c) 2 Bott P. L. pl. 1002, 6th ed.

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at the *Easter* Sessions would have known that it was to be resumed at the *Michaelmas* Sessions. Mr. *Manisty* argued that though the Sessions have power to adjourn from one Session to another, according to the decision in *Keen v. Reg. (a)*, the adjournment must be exclusively to the next Session. But there is no enactment or authority to support that argument. I agree that in general it would be desirable to adjourn to the next Session; very seldom would it not be the right and just course; and therefore in practice the Quarter Sessions do adjourn to the next Session. But when time is required for obtaining information it is prudent and proper to adjourn for six months, and there is no reason against it. If the adjournment were to prevent the justices entertaining a matter, it would be set right by application to this Court.

MELLOR J. I am of opinion that we ought not to exercise our jurisdiction to quash this order of Sessions. The jurisdiction to make it attached by proper notice at the *Easter* Sessions, and the justices, as the prison authority, did then entertain the consideration of the presentments, but for want of necessary information they referred the consideration of the question to a limited number of their body. This was a convenient course, and by the same resolution they directed that the report of the committee should be made to the *Michaelmas* Sessions, thus passing over the *Midsummer* Sessions. This was in substance an adjournment of the matter to the *Michaelmas* Sessions; and if so, those Sessions were seised of jurisdiction to entertain the matter. I should be very unwilling to interfere with

(a) 10 Q. B. 928.

the mode in which the Quarter Sessions conduct their business, unless they either exceeded their jurisdiction or the question which they entertained had been allowed to drop at a former Session. Reason and convenience support the present proceeding.

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HANNEN J. Stat. 28 & 29 *Vict. c.* 126. *s.* 24. only requires that the notice should be given three weeks before the consideration of the presentment is entertained, that is, entertained in the first instance, and no further notice is required while the matter is under further consideration. In the present case the matter was not dropped, but remained under consideration by the reference of it to a committee, who were to report to the *Michaelmas* Sessions. Mr. *Manisty* objects that there ought to have been an entry to the effect that the further consideration of the matter was adjourned to those Sessions; but he did not cite any authority to shew that that was necessary, and I do not see any reason why it should be. There was an entry that the matter should stand over till after an intermediate Sessions; and the entry expresses that the matter is to be brought before the Sessions after the consideration and report of the committee. There is no reason or convenience in support of his objection.

Rule discharged.

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Saturday,
April 18th.

KETTLEWELL *against* DYSON.

Interrogatories.

Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. s. 51. Ejectment.

1. In ejectment on the title, the Court will allow the defendant to exhibit interrogatories to the plaintiff as to the links through which he claims to be heir; and this both at common law and under The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125. s. 51.*

2. *Semble*, however, that the plaintiff will not be allowed to exhibit similar interrogatories to the defendant.

3. *Flitcroft v. Fletcher*, 11 *Exch.* 543, recognized as law.

EJECTMENT, in which both parties claimed as heir at law,—the plaintiff through *S. K.*, the maternal ancestor, and the defendant through *T. F.*, the paternal ancestor.

Application was made at Chambers by the defendant, for an order under The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125. s. 51.*, calling on the plaintiff to answer the following interrogatory:—"If you claim that you are heir at law of *S. K.*, through what links do you claim such heirship?"

Willes J. allowed this, saying however that the question was a proper one to bring before the Court.

A cross summons was obtained by the plaintiff to interrogate the defendant as to the links through which he claimed to be heir at law to *T. F.*, but on this no order was made.

C. H. Anderson moved to rescind the order.—It cannot matter to either party through what links his adversary's title is traced. [*Cockburn C. J.* We must treat the two summonses as distinct. There is a difference between exhibiting interrogatories to a man who seeks to disturb another in possession, and exhibiting

them to a man who is in possession and is defending that possession. Requiring the former is only demanding particulars.] *Flitcroft v. Fletcher* (a) is an express decision that this kind of interrogatory is allowable; but the authority of that case has been questioned, and it is at variance with the rule established in Courts of equity that it is not allowable to inquire by interrogatories into the case of the opposite party. Indeed the decision was founded on a mistaken analogy to those cases where Courts of equity allowed interrogatories to be exhibited by defendants in order to extract evidence from a plaintiff which, in consequence of the then state of the law, could not otherwise be obtained. [*Lush J.* In that case *Alderson B.*, p. 546, refers to the ancient practice in real actions brought by an heir on the seisin of his ancestor, where it was not enough to say he was heir to such a one generally, but he was bound to set forth especially in what manner and how he was heir. Why should he not do so now?] In *Finney v. Forward* (b) it was held by the Court of Exchequer itself that the decision in *Flitcroft v. Fletcher* was not to be extended to other actions besides ejectment. It is difficult however to see any distinction in this respect between land and any other property. The plaintiff here could not compel the defendant to answer as to how he intended to support his title; *Horton v. Booth* (c). [He also cited *Gresley v. Mousley* (d) and *Chester v. Wortley* (e).] Another objection is that in ejectment neither party is allowed to interrogate the other without shewing special circumstances for so doing; *Stoate v. Rew* (f), *Pearson v.*

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(a) 11 *Exch.* 543.(c) 2 *H. & N.* 249.(e) 17 *C. B.* 410.(b) 4 *H. & C.* 33.(d) 2 *K. & J.* 288.(f) 14 *C. B. N. S.* 209.

1868. *Turner (a)*. In the former *Willes J.* says, "In a note to

 KETTLEWELL page 165 of the 9th edition of *Chitty's Forms*, p. 210, it is
 v.
 DYSON. said that *Wightman J.*, at Chambers, refused to act upon
Flitcroft v. Fletcher, and held that the defendant could
 not interrogate the plaintiff as to his own pedigree or
 title, but only as to matters tending to establish the
 defendant's own title: *Morgan v. Nicholl*, Feb. 18, 1856,
Cole on Ejectment, p. 204. . . . *The Attorney General v. The*
Corporation of London (b) was a very strong case; but
 the circumstances were peculiar." And *Erle C. J.* says,
 pp. 209—210, "You have no right to ask your opponent
 how he means to support his cause of action; but you
 may interrogate him as to what will enable you to
 support your defence."

COCKBURN C. J. We cannot grant a rule here. *Flitcroft*
v. Fletcher (c) is directly in point. In that case *Alderson*
B. thought that, independent of The Common Law Pro-
 cedure Act, 1854, altogether, the Court has a general
 power to require a person who seeks to disturb the
 possession of another to give particulars shewing by
 what right he does so. The rule laid down in that case
 is most salutary and ought not to be disturbed. If your
 case is a true and honest one you can have no objection
 to tell your pedigree.

On the present occasion we do not say anything about
 the cross summons.

LUSH and HANNEN JJ. concurred.

Rule refused.

(a) 16 C. B. N. S. 157.

(b) 2 Mac. & G. 247.

(c) 11 Exch. 543.

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HILL against The New River Company.*Monday,
April 20th.*

An incorporated water Company created a nuisance in a public highway by leaving unfenced a stream of water which they had caused to spout up in it. The horses of the plaintiff were frightened, and swerving from it fell into an unfenced excavation in the highway made by contractors who were constructing a sewer, and were thereby injured. Held, that the water Company and not the contractors were the parties liable.

*Causa
causans vel
proxima.
Nuisance.
Negligence.*

IN an action for injury to the carriage and horses of the plaintiff, a special case without pleadings was stated by consent, under a Judge's order.

The defendants were a body legally incorporated and the Company mentioned in 15 & 16 *Vict. c. clx.*, intituled "An Act to enable the Governor and Company of the *New River* to improve their supply of water; and for other purposes." The defendants, in the course of the exercise of the powers given them by that Act and the Acts recited therein and incorporated therewith, caused a stream of water to spout up in a public highway, being the main road from *Hertford* to *London*, to a height of about four feet from the level of the road there, and thence, falling and finding its own level, to flow along the highway and to run in a stream by the side thereof. The jet of water thus spouting up and the stream thence flowing were left open and unfenced in the highway, and were dangerous and likely to affright horses. The defendants did not watch or guard the same in any way, and by reason of the premises rendered themselves legally liable for any damage which could in point of law be held

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to be the proximate and necessary result of their acts and defaults. Before and during all the time that the stream of water was so spouting up and flowing, there was an open ditch or cutting which had been cut and excavated by certain contractors in the construction of a sewer along the middle of the highway in a line parallel with the course of the stream, which ditch or cutting was during all the times aforesaid improperly and insufficiently fenced and guarded, and was dangerous to vehicles and horses used in the highway, and by reason of the premises those contractors rendered themselves legally liable for any damage which could in point of law be held to be the proximate and necessary result of their acts and defaults. In this state of things, on the 23rd *June*, 1866, the plaintiff's coachman was lawfully driving the plaintiff's family in his master's carriage along the highway between the stream and the open ditch or cutting, and whilst he was so doing the horses upon seeing the stream of water were affrighted thereby, and swerving away therefrom fell into the ditch or cutting, and were, together with the carriage, injured by the fall. If the ditch or open cutting had been sufficiently and properly fenced and guarded, as it ought to have been, the carriage and horses would not have fallen into the same. If the jet or stream of water had not been spouting up, or if the same had been properly fenced and guarded, as it should have been, the plaintiff's horses would not have been affrighted thereby.

The question for the opinion of the Court, which was at liberty to draw any inference of fact it thought proper, was, whether the plaintiff was entitled to recover.

Brown appeared for the plaintiff, but the Court called on

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Mellish (*F. M. White* with him), for the defendants.—
The contractors for the construction of the sewer, and not the defendants, are the parties liable. The spouting water would not have hurt the carriage and horses if the ill fenced excavation had not existed, and it therefore must be looked on as the proximate cause of the mischief. It is clear law that these parties are not liable either jointly or at the option of the plaintiff. [*Lush J.* Then suppose the spouting water from which the horses ran away was three miles off from the place where the accident happened. *Mellor J.* If the plaintiff cannot sue either of these parties, he is like a man falling between two stools. But the question is, what was the *causa causans*?] There is no such thing as *causa causans*. Every effect proceeds from a number of causes, to inquire into the origin of all of which would be infinite; *Mill's Logic*, Book 3.

Brown, for the plaintiff.—The law must be the same whether this was an artificial excavation or natural ditch, or even a river. And the horses might have started and swerved and damage ensued in either case, or even if there were no excavation at all near the spot.

MELLOR J. So far as I am aware, there is no authority on this point. But on principle I think the proximate cause of the injury is the first negligent act which drove the carriage and horses into the excavation. That act was the spouting up of the water, by which the horses were frightened. That was the *causa causans*

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 brought against the water Company (a).
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LUSH and HANNEN JJ. concurred.

Judgment for the plaintiff.

(a) Lord Bacon, in his *Maxims of the Law*, referring to the maxim of the civil law, 'In jure non remota causa, sed proxima spectatur,' explains it thus: "It were infinite for the law to judge of the causes of causes, and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any farther degree." See *Turner v. Walker*, 6 B. & S. 871.

Wednesday,
 May 6th and
 28th.

GARNETT and others, appellants, BACKHOUSE,
 respondent.

Salmon
 Fishery Act,
 1865, 28 & 29
 Vict. c. 121.
 s. 45.
 Appeal.
 Costs.

ROLLE, appellant, WHYTE, respondent.

Upon appeal against a decision of the Commissioners for *English Fisheries*, under The Salmon Fishery Act, 1865, 28 & 29 Vict. c. 121. s. 45., which by subs. 9 incorporates the provisions of stat. 20 & 21 Vict. c. 43. as to the power of the superior Court to give costs, the respondent on the inquiry before the Commissioners contested the legality of a fishing mill dam, and argued the case on the appeal. Held that this Court, on quashing the order of the Commissioners, had power to order the respondent to pay the appellant his costs.

GARNETT and others, appellants, BACKHOUSE, respondent.

UPON a case stated by the Commissioners for *English Fisheries* pursuant to sect. 45 of The Salmon Fishery Act, 1865, 28 & 29 Vict. c. 121., their order was quashed in *Michaelmas* Term, 1867 (see 8 B. & S. 490), and the following rule was drawn up on the 15th *November*:—

It is ordered that the judgment or declaration of *James Paterson, F. Spratt* and *Henry Scott*, Esqs., three of the special Commissioners for *English fisheries*,

appointed pursuant to the provisions of The Salmon Fishery Act, 1865, deciding a certain fishing mill dam situate on the river *Ribble* at *Low Moor*, near *Clithero*, in the county of *Lancaster*, belonging to the appellants, to be illegal, and ordering the same to be made incapable of catching fish in respect of which the case has been stated, be reversed with costs to be paid by the respondent to the said appellants or their attorney, such costs, if necessary, to be taxed by the coroner and attorney of this Court.

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In this Term, *April 15*, *The Attorney General*, Sir *J. B. Karlake*, obtained a rule calling upon the appellants to shew cause why the above rule should not be amended by striking out so much of it as ordered the respondent to pay to the appellants their costs.

ROLLE, appellant, WHYTE, respondent.

Upon a case stated by the same Commissioners, which was argued in *Michaelmas* Term, 1867, and judgment delivered in *Hilary* Term, 1868, *January 30th* (see 8 *B. & S.* 116), their order was quashed, and a similar rule to that in *Garnett and others*, appts., *Backhouse*, respt., except that it made no mention of costs, was drawn up on the 31st *January*.

In this Term, *April 15*, a rule was obtained, calling upon the respondent to shew cause why the above rule should not be amended by ordering the respondent to pay to the appellant his costs. A summons in the terms of this rule was taken out immediately after judgment was delivered, which stood over by arrangement. In support of the rule an affidavit was filed stating who the respondent was; but it was objected that this affidavit could not be used.

By The Salmon Fishery Act, 1865, 28 & 29 *Vict.*

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c. 121. s. 27., the Board of Conservators constituted a body corporate by sect. 21 are empowered

(4.) “to take legal proceedings against persons violating the provisions of The Salmon Fishery Acts, 1861, 1865, or either of them, or for removing such weirs or other fixed engines as they may be advised are illegal.”

By sect. 28 a fund is provided “for the purpose of defraying any costs, charges, and expenses incurred or to be incurred by them under The Salmon Fishery Acts, 1861, 1865.”

By sect. 43 the Commissioners, in addition to advertising the place and time of holding a Court for determining the legality of all fishing weirs, fishing mill dams and fixed engines on any salmon river “before entering upon an enquiry as to the legality of any fishing weir, fishing mill dam or fixed engine, shall serve a notice on the owner or one of the owners of such fishing weir, fishing milldam, or fixed engine to appear before them at a place and time mentioned in such notice.”

Sect. 44. “On the appearance of the owner or other persons for or against any fishing weir, fishing mill dam, or fixed engine, and after hearing what, if any thing, is alleged by him or them, or on his or their behalf, or in the absence of any such persons, if they or any of them do not appear,” the Commissioners shall decide as to the legality or illegality of the fishing weir, fishing mill dam, or fixed engine, &c.

By sect. 45. “If any person feels aggrieved with any decision of the Commissioners, the person aggrieved may appeal”

1. To one of the superior Courts of law at *Westminster*.

2. The appeal shall be by special case.
3. The special case shall be settled by the Commissioners upon the application of the appellant ;
 "and if the appellant be dissatisfied with the special case as settled by the Commissioners, he may have the same settled by a Judge of one of the said superior Courts, on summons, at Chambers."
4. The appellant shall enter into a recognizance conditioned, among other things, to pay such costs as may be awarded.
9. "Save as hereinbefore varied, the provisions of The Summary Jurisdiction Act," 20. & 21 *Vict. c. 43.*, "as to the powers of the superior Court, as to directing a special case to be stated, as to the enforcing of recognizances, and as to all other matters, shall apply to an appeal under this section in the same manner as if the words 'justice or justices' in the said Summary Jurisdiction Act included the special Commissioners appointed under this Act."

By stat. 20 & 21 *Vict. c. 43. s. 6.* the Court to which a case is transmitted under that Act has power to "make such orders as to costs, as to the Court may seem fit; and all such orders shall be final and conclusive on all parties:" Provided that no justice or justices of the peace who state a case in pursuance of the Act shall be liable to any costs in respect or by reason of the appeal.

Mellish and *Jordan* shewed cause in *Garnett and others*, appts., *Backhouse*, respt.—The appellants are entitled to costs against the respondent, on the ground that this appeal is on the same footing as an appeal under stat. 20 & 21 *Vict. c. 43. s. 6.*, which gives the Court of Appeal power over the costs, except that the

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justices shall not be liable; therefore the Commissioners are exempt from costs; but the Board of conservators are not if they take legal proceedings. [*Lush J. Stat. 28 & 29 Vict. c. 121. s. 45. subs. 3.* does not suppose that there is a respondent.] The Commissioners are to settle the case, and therefore there is no occasion for a provision enabling the respondent to go before a Judge. [*Blackburn J.* There may be some difficulty in finding a respondent. The Commissioners under The Salmon Fishery Acts have a sort of commission in eyre; having summoned the owner of the fishing weir or fishing mill dam to attend their Court, they hear what other persons allege for or against it.] Suppose the decision of the Commissioners had been in favour of the mill dam, and the party contesting it had appealed and this Court had reversed the decision of the Commissioners, it would have had jurisdiction to award costs. The Legislature must have intended that the owner of a mill dam upon whom litigation is forced and who successfully defends himself should have his costs. Where the Crown is the real respondent it is liable to pay costs under stat. 20 & 21 *Vict. c. 43. s. 6.*; *Moore*, appt., *Smith*, respt. (a). For if the Crown receives costs it also pays costs. Under sect. 11 of stat. 23 & 24 *Vict. c. 34.* the suppliant in a petition of right is entitled to costs against the Crown, and in proceedings relating to the Revenue the Crown if unsuccessful pays costs (b).

The Attorney General, Sir J. B. Karlake, argued in support of the rule in the first case, and shewing cause against the rule in the second.—The Commissioners act *mero motu* in performance of a public duty

(a) 1 *E. & E.* 597.

(b) See stat. 18 & 19 *Vict. c. 90.*

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under stat. 28 & 29 *Vict. c.* 121. By sects. 42 and 43, without any complaint or information having been made, they issue advertisements of the place and time of holding their Court according to form A. in the second Schedule. In summary proceedings before justices under stat. 20 & 21 *Vict. c.* 43. there must be a respondent, who may take an active part before the justices. [He referred to sects. 2, 5.] Under stat. 28 & 29 *Vict. c.* 121. it is not necessary that any person should appear before the Commissioners, and a case may be stated by them without a respondent. [*Lush J.* If the appellant in a case so stated fails, who would claim the costs under his recognizances?] Mr. *Paterson*, the Commissioner, states that the practice in *Ireland* is not to grant costs whether a respondent is named or not. [He referred to The Salmon Fishery (*Ireland*) Act, 1863, 26 & 27 *Vict. c.* 114.] Stat. 28 & 29 *Vict. c.* 121. s. 45. subs. 3. does not say who is to be the respondent. [*Blackburn J.* If the appellant is dissatisfied with the special case as settled before the Commissioners, on whom is the summons to be served?] On the respondent if there is one, if not, on the Commissioners. If a formal respondent is named by the Commissioners there is no provision that he should pay costs. [*Blackburn J.* When a respondent is named with the chance of getting costs it is reasonable that he should pay costs if the appellant succeeds.] In the second of these cases the order of the Commissioners was quashed without costs, and the Court will not now interfere nor allow an affidavit to be used to shew who was the respondent.

Cowie, in support of the rule in *Rolle v. Whyte*.—The Board of conservators invested with duties and powers under stat. 28 & 29 *Vict. c.* 121., may be and are the

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most proper persons to be made respondents under sect. 27. Where there is no respondent it may be that the Court cannot make an order for costs; but here the Commissioners have named a respondent, and even if the affidavit cannot be used it will be presumed that they had good reason for so doing; and he is subject to the same regulations and liabilities as a respondent under stat. 20 & 21 *Vict. c. 43. s. 6.* Stat. 28 & 29 *Vict. c. 121. s. 45.* makes no variation in the provision of stat. 20 & 21 *Vict. c. 43. s. 2.* as to notice of appeal, and therefore notice must be given to him as "the other party to the proceeding" under that section. Where an appeal against a conviction of justices is successful the Court will order the prosecuting party to pay the costs of the appeal, though he does not appear; *Reg. v. Purdey (a)*, *The Wednesbury Local Board of Health*, appts., *Stephenson*, respt. (b). The inquiry conducted by the Commissioners under sects. 40 and 42 of stat. 28 & 29 *Vict. c. 121.* must be based on information given to them, although it is not so specified. [He also referred to sects. 27, subs. (4), 28, 44.]

Archibald, who was for the respondent in *Garnett and others*, appts., *Backhouse*, respt., and for the appellant in *Rolle*, appt., *Whyte*, respt., took no part in the argument on either side.

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BLACKBURN J. In *Garnett and others*, appts., *Backhouse*, respt., I am of opinion that the Court had jurisdiction to make an order upon the respondent to pay the appellants' costs. Stat. 28 & 29 *Vict. c. 121. s. 45.*

(a) 5 *B. & S.* 909.

(b) 33 *L. J. M. C.* 111; 10 *Jur. N. S.* 151.

gives an appeal against the decision of the Commissioners, and by subs. 9 incorporates the provisions of 20 & 21 *Vict. c. 43.* save as thereinbefore varied, which is a very inconvenient mode of legislation. However, stat. 20 & 21 *Vict. c. 43. s. 6.* is not restrained or limited as to the power of giving costs; therefore, on appeals against orders of the Commissioners, we have power to make such orders as to costs as we think fit, provided the Commissioners are not made liable.

The question then is whether there could be and whether there was a respondent in this case? It has been pointed out that by stat. 28 & 29 *Vict. c. 121. s. 27, subs. (4),* the Board of Conservators may appear as prosecutors and institute proceedings. Independently of that, other persons may have an interest to appear before the Commissioners; and sect. 44 contemplates there being parties on each side. I agree with the Attorney General that it is not necessary that there should be a respondent, and in that case there may be a difficulty in saying how the proceedings on an appeal should be carried on, as *Reg. v. Purdey (a)* shews that the Commissioners could not be made respondents. But it is sufficient to say that there may be a respondent. Where a fishing weir is declared to be legal, a person cannot appeal against the decision without making himself a party, but how is not very clear. Here the respondent was treated as respondent in the proceeding before the Commissioners, and performed all the duties of one, for he conducted the litigation or allowed it to be conducted in his own name, so that we cannot say that he was a merely nominal respondent. If there were no respondent who was responsible and

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(a) 6 *B. & S.* 909.

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bound to pay costs the Court would not in general grant costs against the appellant, and the Commissioners therefore would do well to name a respondent who, being willing to pay costs if the appellant succeeded, would get them if he failed.

In the case of *Rolle*, appt., *Whyte*, respt., the Court took time to consider their judgment, and when it was given, being silent as to costs, the rule for quashing the order was drawn up according to the practice without mentioning costs, the presumption being that the appeal was reasonable. If judgment had been given on an earlier day in *Hilary* Term, an application to the Court on the ground that costs had been inadvertently omitted should have been made during the Term, but having been delivered on the last day but one, and this rule having been applied for on the first day of the present Term, the Judges who heard and determined the appeal have power to give costs to the appellant; it is for them in the exercise of their discretion to say whether they will give costs.

LUSH J. The Commissioners may originate an inquiry into the legality of a fishing weir, fishing mill dam or fixed engine; and in that case it would not be proper to put forward any person as a respondent. But if a person appears before them attacking the fishing weir, mill dam, or fixed engine, he is in the same position as any other prosecutor. Sect. 27, subs. (4), of stat. 28 & 29 *Vict.* c. 121. gives power to the Board of conservators to take legal proceedings for removing weirs or other fixed engines, but does not exclude the action of other persons, and sect. 44 assumes that some person may appear before the Commissioners to contest the right to the weir as well as some person supporting it. Here the proceedings were

originated by the Commissioners, but, the case being presented in the name of a respondent, we may assume that he was properly named respondent; and then stat. 20 & 21 *Vict. c. 43. s. 6.*, which is incorporated with stat. 28 & 29 *Vict. c. 121. s. 45.*, by subs. 9 gives this Court power over the costs.

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Rule discharged.

May 28. LUSH J. The appeal in this case was argued before the Lord Chief Justice and myself, and he agrees with me that the appellant should have his costs. Therefore the rule will be absolute.

[*Thursday,*
May 28th.]

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Rule absolute.

In the matter of a *Plaint* between BEARDNELL
and others *against* BEESON.

Friday,
May 8th.

The Merchant Shipping Act, 1854, 17 & 18 *Vict. c. 104. ss. 458. 460.*, entitles a person by whom services are rendered to a ship in distress to "a reasonable amount of salvage," which in case of dispute, within certain limits as to amount, shall be referred to the arbitration of justices of the peace. By The Merchant Shipping Amendment Act, 1862, 25 & 26 *Vict. c. 63. s. 49 (6.)*, It shall be competent for any County Court Judge to exercise the same jurisdiction in salvage cases as is given to two justices. By r. 276 of the Rules, Orders and Forms for regulating the practice of the County Courts, &c., 1867, "In proceedings in the County Courts under . . . 25 & 26 *Vict. c. 63.*, a *plaint* shall be entered, and a summons shall be issued thereon, and the rules and practice of the Court shall be adopted with respect to such proceedings, so far as the same are applicable." A *plaint* was entered and summons issued in a County Court, and the particulars claimed "250*l.*, the amount agreed to be paid" for getting the defendant's schooner off the shore. The value of the schooner was under 1000*l.* On motion to set aside the order of a Judge prohibiting the County Court Judge from hearing the *plaint*: Held,

Merchant
Shipping Acts,
1854, 1862.
17 & 18 Vict.
c. 104. ss. 458.
460., 25 & 26
Vict. c. 63.
s. 49.
County Court
Rules, &c.,
1867, r. 276.
Salvage.
County Court
Judge.

1. That by stat. 25 & 26 *Vict. c. 63. s. 49 (6.)*, the jurisdiction was given to the County Court Judge as an independent arbitrator, and not as Judge of the County Court.

2. That the proceeding before him was properly commenced by *plaint* and summons, in pursuance of the County Court Rules, &c., 1867, r. 276.

3. That this was a claim for salvage, the amount of which was to be determined notwithstanding the bargain for a fixed sum, and therefore the County Court Judge had exclusive jurisdiction.

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APRIL 30. *C. Crompton* obtained a rule calling upon the defendant to shew cause why an order of *Willes J.* for a prohibition, and the prohibition issued to the Judge of the County Court of *Northumberland* holden at *Berwick upon Tweed* from proceeding with the hearing of a plaint commenced in that Court, should not be set aside.

A plaint in the usual form was entered in the County Court to recover 250*l.*, the amount claimed by the plaintiffs for salvage services rendered to the schooner *Pride*, of which the defendant was owner, in getting her off the shore of the coast of *Northumberland*, where she had run aground, and in taking her and her cargo to a place of safety.

The summons was in the following form:—

“In the County Court of *Northumberland*, holden at *Berwick*. Between *Beardnell and others*, plaintiffs, and *Beeson*, defendant. You are hereby summoned to appear at a County Court to be holden at *Berwick*, on &c., to answer the plaintiffs to a claim for amount agreed to be paid to plaintiffs for getting defendant’s schooner *Pride* off the shore, and taking said schooner into a place of safety, the particulars of which are hereunto annexed.

“Dated &c. *Stephenson Banderson*, Registrar of the Court.”

The particulars were:—“The plaintiffs claim 250*l.*, the amount agreed to be paid to them for getting the defendant’s schooner *Pride* off the shore of the coast of *Northumberland*, at or near *Holy Island*, and taking the said schooner and her cargo into a place of safety, the whole value of the schooner and her cargo, tackle, apparel and furniture not exceeding the sum of 1000*l.*”

On the 8th *April*, *Willes* J. made the order in question *ex parte* on the ground that the cause was beyond the jurisdiction of the County Court.

The value of the schooner as shewn by the valuation made pursuant to The Merchant Shipping Act, 1852, sect. 15, was under 1000*l.*, and the value of the cargo did not exceed 400*l.*

The agreement was as follows :—“This is to certify that I, *George Harris*, master of the *Pride*, the ship being on shore and in danger of becoming a wreck, agree to pay the sum of 250 pounds sterling to a certain number of men providing they can get the ship and cargo off and safely into some place of safety. *George Harris*, master.”

The Merchant Shipping Act, 1854, 17 & 18 *Vict.* c. 104., Part VIII., sect. 458, enacts, that whenever any ship is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the *United Kingdom*, and services are rendered by any person in assisting the ship, or in saving the cargo, &c. ; there shall be payable by the owners to the person by whom the services are rendered “a reasonable amount of salvage,” together with all expenses properly incurred, the amount of the salvage and expenses (which expenses are thereafter included under the term salvage) to be determined in case of dispute in manner thereafter mentioned. By sect. 460, whenever a dispute arises elsewhere than within the boundaries of the *Cinque Ports* between the owners and the salvors as to the amount of salvage and the parties to the dispute cannot agree as to the settlement thereof, if the sum claimed does not exceed 200*l.*, the dispute shall be referred to the arbitration of two justices of the peace &c. : “But if the sum claimed exceeds 200*l.*, such dispute may,

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with the consent of the parties, be referred to the arbitration of such justices as aforesaid, but if they do not consent, shall in *England* be decided by the High Court of Admiralty of *England*," &c.

By The Merchant Shipping Act Amendment Act, 1862, 25 & 26 *Vict.* c. 63. s. 1., that Act "shall be construed with and as part of The Merchant Shipping Act, 1854, hereinafter called the principal Act."

By sect. 49 the provisions contained in Part VIII. of the principal Act for giving summary jurisdiction to two justices in salvage cases, &c., are amended.

"(1.) Such provision shall extend to all cases in which the value of the property saved does not exceed 1000*l.*, as well as to the cases provided for by the principal Act :"

"(6.) It shall be competent for any stipendiary magistrate, and also in *England* for any County Court Judge, &c., to exercise the same jurisdiction in salvage cases as is given to two justices."

Rule 276 of the Rules, Orders and Forms for regulating the Practice of the County Courts, 1867 :—"In proceedings in the County Courts under sect. 50 of 16 & 17 *Vict.* c. 51., 18 & 19 *Vict.* c. 122., and 25 & 26 *Vict.* c. 63., a plaint shall be entered, and a summons shall be issued thereon, and the rules and practice of the Court shall be adopted with respect to such proceedings, so far as the same are applicable." (See *Pollock and Nicol's Practice of the County Courts*, p. 493, 6th ed.)

Lumley Smith shewed cause.—First. The summons and particulars shew that this is a claim for an agreed sum exceeding 50*l.*, and not for salvage. In *The Mulgrave* (a) there was a special agreement for a fixed

(a) 2 *Hagg. Adm. Rep.* 77.

sum to render assistance to a vessel in distress, and Lord *Stowell* held that the case was one of contract, and therefore dismissed a claim for salvage. In *The True Blue* (a) Dr. *Lushington* held that an agreement for a fixed sum could be legally made between the master of a vessel in distress and persons affording a salvage assistance, and that such an agreement was binding and not to be disturbed by a judgment of that Court. In *The William and John* (b) the sum agreed upon gave the justices jurisdiction under stat. 25 & 26 *Vict. c. 63. s. 49.*, and they adjudged the amount to be exorbitant and awarded a less sum; and Dr. *Lushington* held that they had exclusive jurisdiction and might deal with the agreement as they had done. The words of stat. 17 & 18 *Vict. c. 104. s. 458.* confine the summary remedy given by that and the subsequent Act to cases in which "a reasonable amount of salvage" is claimed. It was intended to leave the cases in which a fixed sum was agreed upon to the superior Courts.

Secondly. A salvage claim cannot be recovered by plaint in the County Court. Stat. 25 & 26 *Vict. c. 63. s. 49 (6.)* gives jurisdiction to the County Court Judge as an independent arbitrator and not as Judge of the Court. [He cited *Owen v. The London and North Western Railway Company* (c).] [Blackburn J. The Legislature intended that a County Court Judge having one of these claims before him might dispose of it though he was moved to another district.] Then Rule 276 of the Rules, Orders and Forms for regulating the practice of the County Courts, 1867, which draws the case into the County Court, was made by the County Court

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(a) 2 *W. Rob.* 176.(b) *Br. & Lush.* 49.(c) 7 *B. & S.* 758.

1868. Judges ultra vires. Under sect. 464 of stat. 17 & 18
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BEESON. *Vict. c. 104.* the appeal from the justices is to the Court
 of Admiralty; but in this proceeding by plaint in the
 County Court the appeal will be to the superior Courts
 of common law.

C. Crompton, in support of the rule.—Stat. 25 & 26
Vict. c. 63. s. 49 (6.) gives the County Court Judge
 exclusive jurisdiction where there is a bonâ fide agree-
 ment between the master of a vessel in distress and per-
 sons affording a salvage assistance for a fixed sum which is
 fair and reasonable; *The True Blue (a)*. [*Blackburn J.*
 In that case Dr. *Lushington* held that the Court of
 Admiralty would not open the agreement, not that it
 had not jurisdiction.] Here the bargain for 250*l.* was
 made before the ship was got off the shore, as it
 was in *The William and John (b)*. In *The Crus (c)*
 an agreement for a fixed sum was set aside as corrupt;
 and it was not suggested that in the case of an agree-
 ment for a fixed sum the Court of Admiralty had not
 jurisdiction.

BLACKBURN J. The decision of Dr. *Lushington* in
The William and John (b) is conclusive that the order
 for a prohibition ought not to have been made, and that
 the County Court Judge not only had jurisdiction, but
 jurisdiction exclusive of the Admiralty Court. [After
 stating the substance of The Merchant Shipping Act,
 1854, 17 & 18 *Vict. c. 104. ss. 458. 460.*, and The Mer-
 chant Shipping Act Amendment Act, 1862, 25 & 26 *Vict.*
c. 63. s. 49 (1.) (6.), his Lordship proceeded.] These two

(a) 2 *W. Rob.* 176.

(b) *Br. & Lush.* 49.

(c) 1 *Lush. Adm. Rep.* 583.

statutes, as Dr. *Lushington* said in *The William and John*, p. 55, are to be read as one, thus: "If the sum claimed does not exceed 200*l.*, or if the property saved does not exceed 1000*l.*, such dispute shall be referred to the justices." Therefore, subject to the rules which apply to salvage generally, sect. 49 of the later Act confers upon the County Court Judge jurisdiction if either the sum claimed does not exceed 200*l.*, or the property saved does not exceed 1000*l.* In the present case, although the sum claimed exceeds 200*l.*, the value of the property saved is less than 1000*l.*

Mr. *Smith* urged that these cases ought not to be conducted in the County Court, but before the County Court Judge as an arbitrator, and that argument is well founded. Nevertheless the proceeding must be instituted in some form so as to give notice to the other party, in order that it may not be determined *ex parte*. And a rule has been made by the County Court Judges, which it was competent for them to make, that in proceedings under The Merchant Shipping Act, 1862, a plaint shall be entered and a summons issued, and the rules and practice of the County Court adopted "so far as the same are applicable." Under this rule the County Court Judge would decide the matter, not exercising his usual jurisdiction, but subject to an appeal to the Court of Admiralty. Mr. *Smith* failed to shew any better way in which the claim for salvage could be originated before the County Court Judge quâ arbitrator.

We now come to the real ground on which my brother *Willes* granted the prohibition. The words of The Merchant Shipping Act, 1854, are that "a reasonable amount of salvage" shall be paid by the owners of the ship in distress, which is no more than what the salvors

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would be entitled to by the common law as administered in the Court of Admiralty. On that the doubt has arisen whether the jurisdiction of the County Court Judge is not ousted where the quantum meruit has been determined by an express bargain. But we find the law laid down by the decisions in the Admiralty Court is, that when a bargain has been made for a fixed sum, and it is a reasonable one and not excessive, the parties are bound by it, and the Court will not allow the salvors to claim upon a quantum meruit. Nor probably would they allow the owner to cut it down, if he made a bargain with his eyes open, though there is a greater probability of the owner of a ship in distress being driven to make a hard bargain. It may be said why should not the Court of Admiralty have jurisdiction when the sum to be paid for salvage is agreed upon to decide, among other things, whether it is extortionate? The case of *The William and John* (a) expressly raised the question. There the salvors, before assisting the ship, procured the following agreement signed by the master:—
“October 20th. I hereby agree to pay *Charles Salmon* the sum of 140*l.*, and his crew of the life boat, to take the brig *William and John* into *Yarmouth Harbour*.”
This was an express bargain to pay 140*l.*, but the owners of the ship gave notice to the salvors to appear before justices of the peace, who decided that the sum was exorbitant, and reduced it to 70*l.* The salvors then sued in the Court of Admiralty, and Dr. *Lushington* held that the justices had a right to entertain the cause; and, having pointed out the difficulty in some cases of ascertaining what was the sum really claimed, he said, p. 55, “There is one argument which I ought to notice, viz., that, in cases of agreement, the justices are not a

(a) *Br. & Lush.* 49.

competent tribunal. Such is not the case. The effect of an agreement is this only, that where the suit has been rightly commenced in this Court (by reason of the claim being over 200*l.*, and (a) the value of the property saved being over 1000*l.*), and the Court has awarded less than 200*l.*, the fact of the agreement may induce the Court to certify that the case was a proper one for a superior tribunal, and to give the salvors costs, of which they would otherwise be deprived by the statute." In that case the justices gave a less sum than that named in the agreement; and the County Court Judge is not bound by the sum agreed upon.

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MELLOR J. The object of the statutes giving jurisdiction to the County Courts is to provide a more speedy and economical remedy, and the same intention is manifested in stat. 25 & 26 *Vict. c. 63. s. 49.* in favour of those who have performed salvage services by giving jurisdiction to the County Court Judge as an arbitrator, according to principles which govern the law of salvage.

The chief objection to the jurisdiction of the County Court Judge is that this is not a case of salvage, because a specific amount has been agreed upon; but the cases in the Admiralty Court shew that such an agreement does not affect the jurisdiction of the County Court Judge.

As to the objection that the form in which the power of the County Court Judge is called into exercise is not that which ought to be adopted. It is described as a plaint and summons in rule 276 of the Rules, Orders and Forms for regulating the Practice of the County Courts, 1867. I do not see any reason against it; and where the jurisdiction is clear we should be very chary in interfering on the ground that the mode by which

(a) *Sic.*

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the parties are brought before the Judge is irregular. It does not follow that he should try the case by a jury, or that there is an appeal to one of the superior Courts instead of the Court of Admiralty, which is given by sect. 464 of stat. 17 & 18 *Vict. c. 104*.

LUSH J. On first reading sections 458, 460, of stat. 17 & 18 *Vict. c. 104*., I was strongly inclined to take the other view, because they refer to a question of the reasonableness of the salvage. The words in sect. 458 "reasonable amount of salvage" would not be applicable where there is a contract binding between the parties as to the amount, which neither could increase or diminish. But the decisions in the Admiralty Court are that the amount agreed to be paid, unless reasonable, is not binding, and that the Court is to be guided by evidence as to what is a reasonable amount. The case of *The William and John (a)* clearly decides that the justices may award less or more than the sum mentioned in the agreement, and where the amount claimed is within the statutory limits the Court of Admiralty has no jurisdiction. It follows that in the present case the County Court Judge had jurisdiction notwithstanding the agreement, and that he had exclusive jurisdiction.

C. Crompton applied for costs on the ground that the application to the Judge was *ex parte*.

BLACKBURN J. It would have been better that a summons should have been issued, but this being an appeal from the decision of a Judge,

Rule absolute, without costs.

(a) *Br. & Lush. 49.*

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LAWRENCE, appellant, KING, respondent.

*Saturday,
April 25th.*

Permitting animals to lie about a highway, either with or without a keeper, is an offence within The Highway Act, 1864, 27 & 28 Vict. c. 101. s. 25.

*Highway Act,
1864, 27 & 28
Vict. c. 101.
s. 25.*

*Animals lying
about highway.*

THE appellant was charged by the respondent before two justices of the county of *Hertford*, under The Highway Act, 1864, 27 & 28 Vict. c. 101. s. 25., as being the owner of sixteen sheep and twelve lambs found lying about the highway in the parish of *Hatfield*.

On the hearing it appeared that the animals were found lying about the highway so as to obstruct the passage of carriages. They were under the control of a boy, who was sometimes walking about and at other times lying down, and they occasionally strayed to some distance from him. No right of pasturage on either side of the highway was claimed by the appellant. The justices held that, as the words "without a keeper" in stat. 5 & 6 W. 4. c. 50. s. 74. are omitted from sect. 25 of stat. 27 & 28 Vict. c. 101., the intention of the Legislature was to prevent cattle being allowed to lie about any highway whether with or without a keeper. And, the practice being very common and the cause of considerable damage to hedges, banks and fences of adjoining owners, they convicted the appellant, subject to a case for the opinion of this Court.

Denman (*H. Ludlow* with him), for the respondent.—
The question turns on The Highway Act, 1864, 27 & 28 Vict. c. 101. s. 25., which, after repealing The Highway

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Act, 1835, 5 & 6 W. 4. c. 50. s. 74., enacts that "If any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, goat, kid, or swine is at any time found straying on or lying about any highway, or across any part thereof, or by the sides thereof, (except &c.)," the owner shall be liable to a penalty not exceeding 5s., &c.: "Provided, that nothing in this Act shall be deemed to extend to take away any right of pasturage which may exist on the sides of any highway." The repealed statute made the offence to consist in the animals being "found wandering, straying, or lying, or being depastured" on the highway "without a keeper," which latter words are here omitted. The term "straying" *primâ facie* means that animals are not under the control of a keeper. *Morris*, appt., *Jeffries*, respt. (a) may be relied on by the other side, but that case was decided on stat. 4 G. 4. c. 95. s. 75., and it was specially found that the horses were under the control of a carter, and therefore could not be said to be "wandering, straying or lying about." Besides the question there was, whether the cattle had been properly impounded, a fact negatived by the presence of the keeper.

Poland, for the appellant.—*Morris*, appt., *Jeffries*, respt. (a) is in point, although the language of the statutes is not quite the same, the object of both being to prevent obstructions from cattle unattended by keepers. There is no difference between cattle straying and lying down under the control of a keeper. [*Blackburn J.* Cattle cannot be *straying* if they are under the control of a keeper, but sheep lying down will run into the way of persons coming near them.] Then a person

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driving cattle to market along a highway must not let them lie down while on the road.

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Denman was not called on to reply.

BLACKBURN J. The cattle here were found on this highway under the control of a boy who neglected his duty. The justices were right both in their decision and the grounds of it. Stat. 5 & 6 W. 4. c. 50. s. 74. made it an offence "If any horse, ass, sheep, swine, or other beast or cattle of any kind shall at any time be found wandering, straying, or lying, or being depastured, on any highway or on the sides thereof, without a keeper." On the plain construction of this Act the leaving cattle "wandering" or "straying" on the highway is made an offence, and the case cited, *Morris*, appt., *Jeffries*, *respt.* (a), decides under similar words in stat. 4 G. 4. c. 95. s. 75. that there was no offence if the cattle were under the control of a keeper. The recent statute 27 & 28 Vict. c. 101. s. 25. repeals this 74th section of 5 & 6 W. 4. c. 50. and says, if any horse &c. "is at any time found straying on or lying about any highway, &c." the owner shall be liable to a penalty, and adds a proviso "Nothing in this Act shall be deemed to extend to take away any right of pasturage which may exist on the sides of any highway." In the first Act the Legislature make it an offence if cattle are found wandering or straying, or if they are found on the highway lying without a keeper. In the second (or recent) Act the Legislature make it an offence to allow cattle to be lying about the highway; so that if cattle are on the highway with a keeper and he neglects his duty that will

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be an offence. If this had been an original enactment such would have been the meaning, but the alteration of the words in the other Act by omitting the words "without a keeper" makes it very plain. If cattle going to market lie down for a moment, and are then roused and go on, that would hardly be lying about the highway, as for the completion of that offence we must allow a little time. And I do not think the section would apply where there is a right of pasture on the sides of the road and the cattle did not lie down. But where cattle, as in this case sheep, without a right of pasture do lie about a highway, and with a keeper who neglects his duty, it is otherwise. In *Morris*, appt., *Jeffries*, respt. (a), the horses were grazing on the sides of the road under the control of a keeper and therefore were not straying—they were not found lying down on the road at all.

MELLOR J. I am of the same opinion. The language of sect. 25 of stat. 27 & 28 *Vict. c. 101.*, "found straying on or lying about any highway," creates two offences: First. Allowing cattle to go on a highway at all without a keeper. Secondly. It is also an offence if they are permitted by a person who is in charge of and has control over them to be or lie about off a highway so as to create the same obstruction. The justices here were therefore right. The intentional alteration of the enactment from the previous Act favours our construction.

Judgment for the respondent.

(a) 35 *L. J. M. C.* 143; *L. R.* 1 *Q. B.* 261.

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The QUEEN *against* JAMES VAUGHAN, Esq., and
EDWARD JOHN EYRE, Esq.,

Friday.
May 8th.

Stats. 11 & 12 *W. 3. c. 12.* and 42 *G. 3. c. 85. s. 1.* enact that offences committed out of *Great Britain* by governors of colonies, &c. in the execution, or under colour, or in exercise of their offices, may be prosecuted or inquired of, heard and determined in the Court of King's Bench, either upon information by the Attorney General, or upon indictment, and the offence may be laid to have been committed in *Middlesex*. By stat. 11 & 12 *Vict. c. 42. s. 2.*, in all cases of offences committed on land beyond the seas for which an indictment may legally be preferred in any place within *England* or *Wales*, justices may issue their warrant to apprehend the person charged; and sect. 20 empowers them to bind by recognizance the prosecutor and witnesses to appear at the next Court of oyer and terminer or gaol delivery, and the recognizances and depositions shall be delivered to the proper officer of the Court in which the trial is to be had. Sect. 25 directs the committal of the accused party to the common gaol of the county, &c. within which the justices have jurisdiction. A Metropolitan Police Magistrate having declined to hear a charge preferred against *E.* under stats. 11 & 12 *W. 3. c. 12.* and 42 *G. 3. c. 85. s. 1.*; Held,

1. That the application to the Court should be for a mandamus to the magistrate to hear the evidence and not for a rule under stat. 11 & 12 *Vict. c. 44. s. 5.*

2. That the powers given to justices by stat. 11 & 12 *Vict. c. 42. ss. 2. 20.* applied to offences committed under stats. 11 & 12 *W. 3. c. 12.* and 42 *G. 3. c. 85.*

11 & 12 *W. 3. c. 12.*
42 *G. 3. c. 85. s. 1.*
11 & 12 *Vict. c. 43. ss. 2. 20.; c. 44. s. 5.*
Offence by governor, &c., of colony.
Trial.
Court of oyer and terminer.
Justice of peace.
Jurisdiction.

RULE calling upon *James Vaughan*, Esq., one of the Metropolitan Police Magistrates sitting at the *Bow Street* Police Court, and the defendant, to shew cause why a writ of mandamus should not issue commanding the magistrate to hear the evidence on certain charges preferred against the defendant on the 22nd *April*, and to proceed thereon according to law.

It appeared from the affidavits that the defendant was governor of the island of *Jamaica* in 1865, and that in *April*, 1868, he being then within the jurisdiction of the Police Courts of the Metropolis, application was made to the magistrate, under stat. 11 & 12 *Vict. c. 42.*, for a warrant or summons against him on a charge of divers misdemeanours committed by him while Governor of

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Jamaica against the provisions of stats. 11 & 12 *W.* 3. c. 12. and 42 *G.* 3. c. 85. s. 1., and in particular for having issued an illegal proclamation of martial law.

Summonses were granted, and on the 22nd *April* the defendant appeared at the Police Court in obedience to them, when the prosecutor and his witnesses were also in attendance. But the magistrate doubting whether he had jurisdiction under stat. 11 & 12 *Vict.* c. 42. s. 2., and therefore declining to proceed except under the direction of the Court of Queen's Bench, it was arranged that the summonses should stand adjourned in order that application might be made to this Court.

Stat. 11 & 12 *W.* 3. c. 12. enacts, "That if any governor, lieutenant-governor, deputy governor, or commander in chief of any plantation or colony within His Majesty's dominions beyond the seas, shall after the 1st day of *August*, 1700, be guilty of oppressing any of His Majesty's subjects beyond the seas, within their respective governments or commands, or shall be guilty of any other crime or offence, contrary to the laws of this realm, or in force within their respective governments or commands, such oppressions, crimes, and offences, shall be inquired of, heard and determined in His Majesty's Court of King's Bench here in *England*, or before such Commissioners, and in such county of this realm, as shall be assigned by His Majesty's Commission, and by good and lawful men of the same county, and that such punishments shall be inflicted on such offenders, as are usually inflicted for offences of like nature committed here in *England*."

Stat. 42 *G.* 3. c. 85. s. 1., after reciting that "persons holding and exercising public employments out of *Great*

Britain often escape punishment for offences committed by them, for want of Courts having a sufficient jurisdiction, in or by reason of their departing from the country or place where such offences have been committed, and that such persons cannot be tried in *Great Britain* for such offences as the law now stands, inasmuch as such offences cannot be laid to have been committed within the body of any county: And whereas it is therefore expedient that such and the like provisions as are contained in" stats. 11 & 12 *W. 3.* c. 12., 13 *G. 3.* c. 63., 24 *G. 3.* c. 25., "should be extended and applied to the punishment of such offenders," enacts, "If any person who now is, or heretofore has been, or shall hereafter be employed by or in the service of His Majesty, his heirs or successors, in any civil or military station, office, or capacity out of *Great Britain*, or shall heretofore have had, held, or exercised, or now has, holds, or exercises, or shall hereafter have, hold, or exercise any public station, office, capacity, or employment, out of *Great Britain*, shall have committed, or shall commit, or shall have heretofore been, or is, or shall hereafter be guilty of any crime, misdemeanor, or offence, in the execution, or under colour, or in the exercise of any such station, office, capacity, or employment as aforesaid, every such crime, offence, or misdemeanor may be prosecuted or inquired of, and heard and determined in His Majesty's Court of King's Bench here in *England*, either upon an information exhibited by His Majesty's Attorney General, or upon an indictment found; in which information or indictment such crime, offence, or misdemeanor may be laid and charged to have been committed in the county of *Middlesex*," and all such persons so offending shall on conviction be liable to such punishment as may be inflicted for any such crime, mis-

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demeanor or offence committed in *England*, “and shall also be liable, at the discretion of His Majesty’s Court of King’s Bench, to be adjudged to be incapable of serving His Majesty in any station, office or capacity, civil or military, or of holding or exercising any public employment whatever.”

Stat. 11 & 12 *Vict. c. 42. s. 2.* “In all cases of indictable crimes or offences of any kind or nature whatsoever committed on the high seas, or in any creek, harbour, haven, or other place in which the Admiralty of *England* have or claim to have jurisdiction, and in all cases of crimes or offences committed on land beyond the seas, for which an indictment may legally be preferred in any place within *England* or *Wales*, it shall be lawful for any one or more of Her Majesty’s justices of the peace for any county, riding, division, liberty, city, borough, or place within *England* or *Wales* in which any person charged with having committed or with being suspected to have committed any such crime or offence shall reside or be, or shall be supposed or suspected to reside or be, to issue his or their warrant (E.) to apprehend the person so charged, and to cause him to be brought before him or them, or some other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place to answer to the said charges, and to be further dealt with according to law.”

Sect. 20. “It shall be lawful for the justice or justices before whom any such witness shall be examined as aforesaid to bind by recognizance (O. 1.) the prosecutor and every such witness to appear at the next Court of oyer and terminer or gaol delivery, or superior Court of a county palatine, or Court of General or Quarter Sessions

of the Peace, at which the accused is to be tried, then and there to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, against the party accused, ; and the several recognizances so taken, together with the written information (if any), the depositions, the statement of the accused, and the recognizance of bail (if any) in every such case, shall be delivered by the said justice or justices, or he or they shall cause the same to be delivered, to the proper officer of the Court in which the trial is to be had, before or at the opening of the said Court on the first day of the sitting thereof, or at such other time as the Judge, Recorder, or justice who is to preside in such Court at the said trial shall order and appoint."

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Sect. 25 enacts that if the evidence shall not be sufficient to put the accused party upon his trial for any indictable offence, the justice or justices shall order him to be discharged ; but if it is sufficient, or if it raises a strong or probable presumption of his guilt, the justice or justices shall commit him to the common gaol or house of correction of the county, &c., " or, in the case of an indictable offence committed on the high seas, or on land beyond the sea, to the common gaol of the county, riding, division, liberty, city, borough, or place within which such justice or justices shall have jurisdiction, to be there safely kept until he shall be thence delivered by due course of law, or admit him to bail as hereinbefore mentioned."

April 30. Before COCKBURN C. J., BLACKBURN, MEL-
LOB and SHEE JJ.

Horne Payne applied in the first instance for a rule under stat. 11 & 12 *Vict. c. 44 s. 5.*, calling upon the magistrate to shew cause why he should not hear the

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evidence.—The provisions in stat. 11 & 12 *Vict. c. 42. ss. 2. 20. 25.*, which give justices power to apprehend for offences committed on land beyond the seas, and to bind over the prosecutor and witnesses, and to commit for trial if the evidence is sufficient, apply to the offences in stats. 11 & 12 *W. 8. c. 12.* and 42 *G. 3. c. 85. s. 1.* The offence with which the defendant is charged is one “for which an indictment may legally be preferred in any place within *England* or *Wales*,” as required by stat. 11 & 12 *Vict. c. 12. s. 2.*; the Court of Queen’s Bench in which the trial must take place is a Court of oyer and terminer for *Middlesex*, as well as throughout *England*, sect. 20, at which the prosecutor and witnesses may be bound over to appear, and the committal would be to the common gaol of that county, sect. 25. In *Lord Sanchar’s Case* (a) “it was objected that the King’s Bench is the highest Court of ordinary justice in criminal causes within the realm, and paramount the authority of justices of gaol delivery, and Commissioners of oyer and terminer; . . . and therefore inasmuch as the justices of the King’s Bench are paramount and superiors over all the others, they cannot be included within their inferiors, viz., justices of gaol delivery, or of oyer and terminer, &c. But it was resolved, that the justices of the King’s Bench are the sovereign justices of gaol delivery and of oyer and terminer and therefore they are included within the said words:” &c. “So high is the authority of this Court” viz., the Queen’s Bench, “that when it comes and sits in any county, the justices of eire, of oyer and terminer, gaol delivery, they which have conusance, &c. do cease without any writing to them;” 4 *Inst.* 73: and therefore stat. 25 *G. 3. c. 18.* was passed to empower the justices of oyer and terminer and gaol

(a) 9 *Co.* 116 a. 117 a. 118 a. b.

delivery of *Newgate* for the county of *Middlesex* to continue to hold their Session notwithstanding the sitting of the King's Bench at *Westminster* or elsewhere in that county. [He also referred to stat. 4 & 5 *W.* 4. c. 36. for establishing the Central Criminal Court.] [*Blackburn J.* That statute does not give that Court jurisdiction over offences which the Legislature have expressly enacted shall be tried in this Court.] "The next Court of oyer and terminer" at which the prosecutor and witnesses will be bound over to appear in pursuance of stat. 11 & 12 *Vict.* c. 42. s. 20. is the next sitting of this Court as such: "the day of sitting may be ascertained by inquiry at the Crown Office, on or after the first day of Term;" *Corner Crown Pr.*, p. 128; and the Queen's coroner is "the proper officer of the Court in which the trial is to be had" to whom in pursuance also of sect. 20 the recognizances and depositions will be delivered. If the magistrate has jurisdiction, it is a right course to make the charge before him previously to preferring a bill before the grand jury, because it gives the accused an opportunity of seeing the depositions on which the Judge would charge the grand jury. [*Blackburn J.* Does stat. 11 & 12 *Vict.* c. 44. s. 5. apply to such a case as this?] It applies to all cases where justices refuse to do an act relating to the duties of their office: here the refusal is to hear the evidence. [*Blackburn J.* Sect. 5 gives a summary remedy where the object is to protect the magistrate from an action being brought against him. No action would lie for hearing and determining upon the evidence, though it would for issuing the warrant. His Lordship referred to the preamble of that section.]

Horne Payne then applied for a rule for a mandamus.

Rule nisi.

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law.” [Blackburn J. Then he would be brought up by habeas corpus to the gaol of *Middlesex* to be tried by the Court of Queen’s Bench.] Stats. 1 & 2 Ph. & M. c. 13. s. 4., 2 & 3 Ph. & M. c. 10. s. 2. and 7 G. 4. c. 64. s. 2. do not apply to this Court, but the two former to Courts of general gaol delivery, the latter to Courts of oyer and terminer, gaol delivery, &c. [He referred to the statutes giving jurisdiction to Courts of oyer and terminer collected in 4 *Stephen’s Comm.* 877, 4th ed.] [Lush J. It was intended by sect. 2 of stat. 11 & 12 Vict. c. 42. that some magistrate should have power to take depositions in all indictable offences. If your argument is right depositions could not be taken in the present case.] It may have been intentionally omitted. [Blackburn J. The taking of depositions is favourable to the accused. Lush J. That is an argument in favour of a wide construction of the words of the enactment.]

The defendant did not shew cause.

Sir R. P. Collier (*Fitzjames Stephen* and *Horne Payne* with him) were not called upon in support of the rule.

BLACKBURN J. It is clear that the rule for a mandamus must be made absolute commanding the magistrate to investigate the charge and decide judicially upon the evidence; and if he thinks there is a *prima facie* case he should bind over the prosecutor and witnesses to give evidence and return the recognizances and depositions to the proper officer of the Court of Queen’s Bench, where alone this charge can be tried, before the next Sitting of the Court; and the grand jury will be summoned in Term. The question depends upon the jurisdiction of

the magistrate and what he is required to do. The jurisdiction of justices to commit for trial was originally limited to offences committed within the limits of their commission; but as to the taking the depositions of witnesses it was very early extended to offences committed elsewhere. Stats. 1 & 2 *Ph. & M. c.* 13. s. 4. and 2 & 3 *Ph. & M. c.* 10. s. 2. required the justices to put the information of the witnesses into writing and to certify them at the next general gaol delivery to be holden within the limits of their commission; the former statute applying only to cases in which the prisoner was bailed, the latter when he was committed for trial. Those enactments were intended as a check upon magistrates in exercising their discretionary power of bailing prisoners; the effect which depositions now produce is to assist the Court and the prisoner at the trial. Then stat. 7 *G. 4. c. 64. s. 2.*, after reciting that it was expedient to amend and extend the provisions of the two Acts of *Philip & Mary*, enacts that the justices before they admit to bail or commit to prison shall take the examination of the prisoner and the information upon oath of the witnesses and put the same, or so much thereof as may be material, in writing; and every justice shall have authority to bind the witnesses by recognizance to appear at the next Court of oyer and terminer, or gaol delivery, &c., "at which the trial thereof is intended to be," though not within the limits of their commission, "then and there to prosecute or give evidence against the party accused; and such justices and justice respectively shall subscribe all such examinations, informations, bailments and recognizances, and deliver or cause the same to be delivered to the proper officer of the Court in which the trial is to be." This enactment which applies to felonies only is by sect. 3 extended to misdemeanours.

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Both sections apply as much to trials in the Queen's Bench as to trials elsewhere. Stat. 11 & 12 *Vict. c. 42.*, for regulating the proceedings of justices out of Sessions, re-enacts these provisions, and extends them by using the words "in all cases of indictable crimes or offences of any kind or nature whatsoever committed on the high seas, &c., and in all cases of crimes or offences committed on land beyond the seas, for which an indictment may legally be preferred in any place within *England* or *Wales.*" The contention is that the class of criminal charges created by the two stats. 11 & 12 *W. 3. c. 12.* and 42 *G. 3. c. 85.*, which are in effect one, viz., crimes and misdemeanours committed by persons in the office of governor and by persons in other offices of authority in the colonies, and which can only be tried in the Court of Queen's Bench in *Middlesex*, do not come within the description of a crime or offence committed on land beyond the seas for which an indictment may legally be preferred in *any place* within *England* and *Wales* within stat. 11 & 12 *Vict. c. 42. s. 2.* But it clearly is such an offence. The section directs the issuing of a warrant for bringing the person charged with the offence before justices. And sect. 20 empowers the justices to bind by recognizance the prosecutor and witnesses "to appear at the next Court of oyer and terminer or gaol delivery, &c., at which the accused is to be tried." On this it is urged that, although the Court of Queen's Bench is a Court of oyer and terminer, and on the trial of a criminal offence peculiarly acts as such, and although such a charge as this is to be tried in the Court of Queen's Bench, and if an indictment is found in the present case it must be tried before it as a Court of oyer and terminer, yet for some reason we are to suppose that sect. 20 was not intended to apply

to the Court of Queen's Bench, when the accused was to be tried there. The reason suggested is an extension of the rule that the prerogative of the Crown is not bound by a statute unless it is named in it. The Court of Queen's Bench it is said is of such high dignity that it is not included in the general term "Court of oyer and terminer" unless expressly mentioned. But on this *Lord Sanchar's Case* (a) is conclusive. It is in all cases oppressive to prefer an indictment *ex parte*; and I think it would be well that in every case the prosecutor should go before a magistrate, and then the depositions would be taken and returned to the Court in which the trial was to be. The Legislature enabling this to be done have used general words in stat. 11 & 12 *Vict. c. 42. s. 2.*, and the object of the enactment applies where a peculiar jurisdiction is given to the Court of Queen's Bench as much as in other cases. As this is the first time this question has been raised the magistrate was perfectly right in taking the opinion of this Court.

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MELLOR J. The language of stat. 42 *G. 3. c. 85. s. 1.*, on which Mr. *Powell's* argument is based, is that the offence "may be prosecuted or inquired of and heard and determined in His Majesty's Court of King's Bench here in *England*, either upon an information exhibited by His Majesty's Attorney General, or upon an indictment found; in which information or indictment such crime, offence, or misdemeanour may be laid and charged to have been committed in *Middlesex*." Mr. *Eyre* was charged before the magistrate with an indictable offence within this statute. But it is said that although he may be tried for this offence in the Court of Queen's Bench

(a) 9 *Co.* 116 *a.* 117 *a.* 118 *a. b.*

1. The first part of the document is a header section containing the following information:
 a. The name of the organization: [REDACTED]
 b. The name of the project: [REDACTED]
 c. The name of the person: [REDACTED]
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 g. The name of the office: [REDACTED]
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 i. The name of the unit: [REDACTED]
 j. The name of the team: [REDACTED]
 k. The name of the group: [REDACTED]
 l. The name of the committee: [REDACTED]
 m. The name of the board: [REDACTED]
 n. The name of the council: [REDACTED]
 o. The name of the commission: [REDACTED]
 p. The name of the department: [REDACTED]
 q. The name of the division: [REDACTED]
 r. The name of the office: [REDACTED]
 s. The name of the section: [REDACTED]
 t. The name of the unit: [REDACTED]
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 v. The name of the group: [REDACTED]
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 x. The name of the board: [REDACTED]
 y. The name of the council: [REDACTED]
 z. The name of the commission: [REDACTED]

[illegible]

[1869.]

PHILLIPS *against* EYRE.[Friday,
January 29th.]

1. Wrongful acts committed in a colony, which has a local legislature with plenary power of legislation subject to the assent of the Sovereign, are protected against subsequent legal proceedings in *English* Courts by an *ex post facto* Act of indemnity passed in the colony.

2. The governor of such a colony may give his official consent to a legislative measure there in which he is individually interested.

3. *Quere*, whether in the case of an act done abroad, in order to found an action before an *English* Court, the act must be tortious according to the law of the particular country as well as of this; or whether the act, if unlawful by the *lex loci*, must give a claim to damages by the latter as well as by the law of this country, in order to give a right to damages here.

Ex post facto
*legislation.**Law of colony*
with inde-
pendent legis-
*lature.**Governor of*
*the colony.**Right of action*
in England.

THE first count alleged that the defendant did on the 24th October, 1865, assault, beat and imprison the plaintiff at the plaintiff's house in the parish of *Vere*, in the county of *Middlesex*, in the island of *Jamaica*, within Her Majesty's dominions, and caused him to be then and there handcuffed and bound with rope, and forced and compelled him to go and caused him to be forcibly conveyed so handcuffed and bound thence to a certain Court House in the aforesaid parish of *Vere*, and there caused him to be placed and held so handcuffed and bound in the custody of a guard of soldiers and imprisoned for a long time. And did, on the 25th October, 1865, at the Court House aforesaid, further assault, beat and imprison the plaintiff, and forced and compelled him to go and caused him to be forcibly conveyed handcuffed and bound with rope thence along certain public streets and highways for a very long distance (to wit) thirty miles to the defendant's house at *Spanish Town*, in the parish of *Saint Catherine's*, in the said county, and there caused him to be held in

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custody and imprisoned for a long time, and did on the said day at the defendant's said house further assault, beat and imprison the plaintiff, and forced and compelled him to go, and caused him to be forcibly conveyed handcuffed and bound with rope in custody from the defendant's said house through and along certain public streets and highways for a long distance (to wit) twenty miles to a certain other place (to wit) *Uppark Camp*, in the parish of *Saint Andrew*, in the county of *Surrey*, in the said island of *Jamaica*, and there caused him to be held in custody and imprisoned and handcuffed and confined in a cell for a long time. And did, on the 26th *October*, 1865, further assault, beat and imprison the plaintiff at the said *Uppark Camp*, and caused him to be placed in the custody of a guard of soldiers, and forced and compelled him to go and caused him to be forcibly conveyed handcuffed and bound from the said *Uppark Camp* through and along certain streets and highways for a long distance to a certain place (to wit) *The Ordnance Wharf*, in the city and parish of *Kingston*, in the said county of *Surrey*, and there imprisoned for a long time. And did on the said 26th *October*, 1865, further assault, beat and imprison the plaintiff at the said *Ordnance Wharf*, and thence caused him to be forcibly conveyed and put on board a certain ship (to wit) *The Wolverine*, and there confined in shackles and forcibly conveyed in the said ship upon the high seas for a long distance (to wit) forty miles to a certain other place (to wit) *Morant Bay*, in the parish of *St. Thomas*, in the said county of *Surrey*, in the said island of *Jamaica*. And did on the 27th *October*, 1865, further assault, beat and imprison the plaintiff at *Morant Bay* aforesaid, and did cause him to be forcibly landed

and conveyed so shackled as aforesaid from the said ship to a certain wharf at *Morant Bay*, and thence compelled him to go and caused him to be forcibly conveyed through divers public streets and highways to a certain building in *Morant Bay* aforesaid, and there caused him to be further bound with cords and forcibly placed and confined in a cell in the said building, and to be therein held in custody and imprisoned for a long time. And did at *Morant Bay* aforesaid further assault, beat and imprison the plaintiff and caused him to be bound with ropes, and so bound to be cruelly beaten, flogged, wounded and tortured. By reason of all which assaults &c.

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The second count was for seizing and taking the plaintiff's goods (that is to say) his books, papers, writings and articles of wearing apparel, and carrying away the same and disposing of them to the defendant's own use. Damages 10,000*l*.

Pleas. First. Not guilty by statutes 7 *Jac.* 1. c. 5., 21 *Jac.* 1. c. 12., 42 *G.* 3. c. 85. s. 6.

Second. That "before and at the time of the committing of the alleged grievances the defendant was Captain General and Governor in Chief of the island of *Jamaica* and the territories depending thereon, the same then and still being a colony or dependency of the *British Crown*, by virtue of a commission from Her Majesty the now *Queen* of the United Kingdom of *Great Britain* and *Ireland* under the great seal of the said *United Kingdom*; and before the said time divers persons in the said island of *Jamaica* had conspired by force to overthrow the constitution and government in the said island by law established, and in pursuance of the said conspiracy great numbers of the inhabitants of the said

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island had broken out into open rebellion and had committed many burglaries, robberies, arsons, murders and other felonies, and the civil power of the said island had been overpowered by the said rebels, and the defendant, with the assistance and co-operation of the military and naval forces of the Queen and of Her Majesty's faithful subjects in the said island, had by force of arms arrested the progress of the said rebellion, and afterwards and after the said rebellion had been so arrested as aforesaid a certain Act of Parliament was made and passed by the Governor, Legislative Council and House of Assembly of the said island of *Jamaica*, in the twenty-ninth year of the now Queen, for the purpose of indemnifying the defendant and all other officers and persons concerned in arresting rebellion in the said island by such force of arms as aforesaid, which said Act (a) was and is in the words and figures following, that is to say, 'Whereas, being seduced by the insidious counsel of wickedly designing persons, many of the Queen's subjects in this island conspired by force to overthrow the constitution and government here established by law; and in furtherance of such their purpose, did, with force, and in confederated multitude, commit, on the 11th day of *October*, in this present year of our Lord 1865, and on divers other days then following, in the parish of *Saint Thomas in the East*, many burglaries, robberies, arsons, murders and other felonies, with treasonous purpose, in renunciation of their natural allegiance, and to the intent of the general massacre of all loyal and well disposed subjects of the Queen here dwelling: And whereas upon being informed of such the aforesaid atrocities, His Excellency *Edward John Eyre*, Esquire, the governor of this island,

(a) Cap. 1.

with the advice of a council of war, and in order to prevent the extension of the said rebellious outbreak, did proclaim that martial law should obtain and prevail throughout the county of *Surrey*, with the exception only of the city and parish of *Kingston*: And whereas, under God's providence, the military and naval forces of the Queen, with the loyal co-operation of others, her Majesty's faithful subjects in this island, have arrested the spread of this rebellion, and saved the lives of law-abiding citizens from imminent general sacrifice: And whereas military, naval, or civil authorities, necessarily employed in the prompt suppression of the atrocities aforesaid, may, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith, for the purpose of restoring public peace, and quelling the rebellion aforesaid: And whereas, it is expedient that all persons whosoever, in good faith, and of loyal resolve, have acted for the crushing of this rebellious outbreak, should be indemnified and kept harmless for such their acts of loyalty: Be it therefore, and it hereby is enacted by the Governor, Legislative Council, and Assembly of this island, First—that all personal actions and suits, indictments, informations, attachments, prosecutions, and proceedings, present or future whatsoever, against such authorities or officers, civil, military, or naval, or other persons acting as last aforesaid, for or by reason of any matter or thing commanded, ordered, directed, or done since the promulgation and publication of the proclamation of martial law aforesaid, whether done in any district in which martial law was proclaimed, or in any district in which martial law was not proclaimed, in furtherance of martial law; that is to say on, from, and after the 18th day of *October* last past,

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and during the continuance of such martial law, in order to suppress the said insurrection and rebellion, and for the preservation of the public peace throughout the island, shall be discharged and made void ; and that every person by whom such act, matter, or thing shall have been advised, commanded, ordered, directed, or done for the purposes aforesaid, on, from, and since the said 13th day of *October*, and during the existence of such martial law, shall be freed, acquitted, discharged, and indemnified as well against the Queen's most gracious Majesty, her heirs and successors, as against all and every persons and person whomsoever. Second—And it is hereby also enacted, that His Excellency *Edward John Eyre*, Esquire, Captain General and Governor in Chief, and all officers and other persons who have acted under his authority, or have acted bonâ fide for the purposes, and during the time aforesaid, whether such acts were done in any district in which martial law was proclaimed, or in any district in which martial law was not proclaimed, are hereby indemnified in respect of all acts, matters, and things done in order to put an end to the said rebellion ; and all such acts so done are hereby made and declared to be lawful, and are confirmed. Third—In order to prevent any doubt which might arise, whether any act alleged to have been done under the authority of the governor, or to have been done bonâ fide in order to suppress and put an end to the said rebellion, was so done, it shall be lawful for the governor for the time being to declare such acts to have been done under such authority, or bonâ fide for the purposes aforesaid ; and such declaration, by any writing under the hand of the governor for the time being shall, in all cases, be conclusive evidence that such acts were so done respectively.' And the defendant

says that by the laws and constitution of the said island the said Governor, Legislative Council and Assembly of the said island had power and authority to make and pass the said Act subject to the assent of Her Most Gracious Majesty thereto, and that afterwards the said Act duly received the assent of Her said Majesty; and all conditions in that behalf to be performed having been performed, and all things necessary to be done having been done, and all times necessary to elapse having elapsed, the said Act became and was and is part of the law of the said island of *Jamaica*. And the defendant further says that the said person in the said Act called His Excellency *Edward John Eyre*, Esquire, was and is the defendant, and that the alleged grievances in the declaration mentioned were committed in the said island of *Jamaica* after the said 13th day of *October*, 1865, and during the continuance of the said rebellion, and before the passing of the said Act, and were measures used in the suppression of the said rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting an end to the said rebellion, and were matters and things done bonâ fide in order to put an end to the said rebellion, and are included in the indemnity given by the said Act."

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Replication. First. Issue on the pleas.

Second. To second plea. Demurrer.

Third. To same. That plaintiff sued not only for the trespasses admitted but also for that the defendant committed such trespasses as are complained of and not included in the said Act, on other occasions, for longer periods of time, and in other places, than are attempted to be justified or excused, and in excess of the said alleged right or excuse.

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Fourth. To same, so far as it related to divers of the said trespasses committed on the high seas and mentioned in the first count, the plaintiff says that the said trespasses were committed beyond the territorial limits within which the said *Jamaica* Legislature had at the said times &c., or at the time when the said Act was made and passed, jurisdiction or authority.

Fifth. To same. That the defendant at the time of the making and passing of the Act in the plea set forth was the governor of the said island of *Jamaica* and the territories thereon depending, and was then present in the said island, and was then acting in such capacity of governor of the said island, and was the governor referred to in the said Act in the words, "Be it therefore, and it hereby is enacted by the Governor, Legislative Council, and Assembly of this island," and was by the law and constitution of *Jamaica* himself a necessary party to the making and passing of the said Act, and the said Act so far as it became the law of *Jamaica* became the law of *Jamaica* by virtue of his consent as such governor, acting with the said Council and Assembly, and could not have become the law of *Jamaica* without the consent of the defendant as such governor.

Rejoinder. First. Joinder in demurrer.

Second. As to the new assignment, not guilty.

Third. Issue on fourth and fifth replications.

Fourth. Demurrer to fifth replication.

Surrejoinder. First. Issue on plea to new assignment.

Second. Joinder in demurrer.

The case was argued in *Michaelmas* Term, 1868, November 17 : before COCKBURN C. J., LUSH and HAYES JJ.

Quain (*Horne Payne* with him), for the plaintiff.— This case involves some novel questions, which must be determined on principle, as there is but little authority to be found upon them. The defence to this action is that the defendant as Governor of *Jamaica* is protected by the law of *Jamaica*, the *lex loci delicti*, from the consequences of supposed tortious acts done there. But the matter of discharge is not founded on a *lex loci* in the strict sense of the word, but on an act of *ex post facto* legislation, made expressly to meet this particular case, though not this particular action. [*Cockburn* C. J. The same may be said of any indemnity Act, even of the Imperial Legislature.] The instant the unlawful act was done, a right of action in *England* vested in the party aggrieved; judgment of Lord *Mansfield* in *Mostyn v. Fabrigas* (a), 4 *Inst.* 134. 137, et seq.; and that right cannot be divested by an Act of indemnity passed by a colonial Legislature. If the defendant were indicted in this Court under the Colonial Governors Act, 11 & 12 *W. 3. c. 12.*, he could not set up as his defence an *ex post facto* law of *Jamaica*. [He was then stopped.]

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Mellish (*Poland* with him), for the defendant.—This case raises the important question whether a local Legislature created by the Crown can by a retrospective Act take away a cause of action here for matters which have arisen within their jurisdiction. The policy of this country of late years has been to confer on colonies, and *Jamaica* in particular, per *Parke* B. in *Beaumont v. Barrett* (b), the right of free and independent government; subordinate indeed to the Imperial Parliament, and to the further condition that the Acts of their Legis-

(a) *Comp.* 161. 172-3.(b) 1 *Moo. P. C. C.* 59. 75-6.

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lature be sanctioned by the Queen in council acting under the advice of responsible ministers. The law of such a colony within the ambit of its jurisdiction is therefore binding on this Court, not so much in virtue of the comity of nations as an independent legislative act. The Courts of this country may inquire into the reasonableness of the byelaws of corporations, and may even refuse to recognize *foreign* laws as repugnant to natural justice ; but with colonial laws it is otherwise. Stat. 28 & 29 *Vict. c. 63.*, after reciting that doubts had been entertained “respecting the validity of divers laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty’s colonies, and respecting the powers of such Legislatures,” and that it was expedient that such doubts should be removed, enacts, by sect. 2, “Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.” Sect. 3. “No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of *England*, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.” A colonial Legislature can render valid marriages which originally were illegal. If the present action were commenced in *Jamaica* and an appeal brought to the Privy Council, it would be held in that Court that

the right of action was extinguished by the Act of indemnity, and yet the opposite party must contend that the plaintiff might still sue in this Court, which ought to hold otherwise. [Cockburn C. J. How far then does the power of a colonial Legislature extend? Suppose they were to enact that no person sustaining any wrong in the colony should have any remedy in *England* according to the *English* law? Lush J. And is that confined to civil torts? Is the law the same if they were to say that a man shall be protected against responsibility for murder?] The colonial Legislature can take away a cause of action, though not the remedy in another country. [Hayes J. It is laid down in *Story on Conf. Laws*, § 388, 6th ed., that there is a distinction between cases where by the *lex loci contractûs* there is a virtual or direct extinguishment of the debt and where there is only a partial extinguishment of the remedy thereon.] It is true that this indemnity Act is an *ex post facto* law, but such laws are not necessarily in violation of natural justice, they are sometimes rightful. Although the right to make them may be abused, Acts of indemnity for things done have been in use in this country from very early times, as for instance, stat. 1 *Ed. 3. st. 1. c. 1.*, 5 *Ric. 2. st. 1. c. 6.*, 1 *H. 4. c. 2.*, 7 *H. 4. c. 18.*, 2 *W. & M. st. 2. c. 13.*, 4 & 5 *W. & M. c. 19.*, 19 *G. 2. c. 20.*; and also by the *Irish* Parliament during the time of its independence. [Cockburn C. J. There was a sweeping Act of indemnity after the *Irish* rebellion.] They are also well known in the colonies after insurrection and disturbance by natives or slaves, as for instance, *New Zealand*, *St. Vincent*, *Ceylon*, *Antigua* and *Lower Canada*. [Cockburn C. J. You need not read them.

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They are all to the same effect.] In practice no actions are brought in defiance of colonial indemnity Acts, and the allowing such would not only open a wide door to litigation, but the indemnity would be useless to persons in the colony, unless an imperial Act is afterwards obtained. [*Lush J.* Is there any instance in which a local indemnity Act has been confirmed by the Imperial Legislature?] Stat. 17 & 18 *Vict. c. 37.* is an indemnity Act for *Mauritius*, but that colony has no local Legislature. The better opinion is that an action is not maintainable in *England* by a *British* subject against another for trespass abroad for which no proceeding could be taken by the law of the place where committed, *Scott v. Lord Seymour* (a); although homicide by a *British* subject abroad is punishable by stat. 24 & 25 *Vict. c. 100. s. 9.*, or is provided for by Acts founded on extradition treaties.

Quain, in reply.—The *Jamaica* Indemnity Act is void by force of stat. 28 & 29 *Vict. c. 63. s. 2.*, as being repugnant to the Colonial Governors Acts, 11 & 12 *W. 3. c. 12.* and 42 *G. 3. c. 85.*, which are Acts of the Imperial Parliament. Colonial laws have no extraterritorial operation. [He cited *Story Confl. Laws*, § 337; 4 *Phill. Int. Law*, 563; *Westlake Priv. Int. Law*. 236-7; *The Halley* (b).] There is no distinction between the laws of a colony and those of a foreign state. The force of each rests on the comity of nations, than which nothing can be more at variance than by ex post facto laws passed abroad to divest inhabitants of a country of rights vested in them. But the replication in this case puts the matter beyond

(a) 1 *H. & C.* 219; in error, *Id.* 231.(b) 32 *L. J. Adm.* 1.

question. For, assuming that colonial Legislatures in general have the power here claimed, the defendant himself as governor of the colony was party to this Act of indemnity, and thereby has attempted to legalize his own misconduct. If this is valid it must be equally so in a Crown colony, where the *sole* legislative power is in the governor. [*Cockburn* C. J. . The defendant appears in two capacities, his public capacity as governor and his private capacity as an individual. *Lush* J. Suppose every member of the *Jamaica* House of Assembly were implicated in this insurrection, would an Act of indemnity passed by them be void?] That is a fluctuating body. [*Lush* J. They cannot legally pass an Act without the consent of the governor.]

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The judgment of the Court was now delivered by

COCKBURN C. J. This is an action for assault and false imprisonment and other personal injuries of a very grievous character, committed by the defendant on the plaintiff in the island of *Jamaica*.

The plea on which the present question turns, admitting, as for the present purpose it must do, the fact of such acts having been done, and of their having been wrongful when done, sets forth an Act of indemnity since passed by the Legislature of *Jamaica*, and afterwards assented to by the Crown, of which the defendant claims the protection in bar of this action.

The Act in question being set forth at length in the plea, it is only necessary for the present purpose to state the substance and effect of it. After reciting that a

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rebellion had broken out in the island, that the governor, with the advice of a council of war, had proclaimed martial law throughout the county of *Surrey*, with the exception only of the city and parish of *Kingston*, and that the military and naval forces with others had arrested the spread of the rebellion; and after further reciting that the military, naval, and civil authorities necessarily employed may, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose of restoring public peace and quelling the rebellion, and that "it is expedient that all persons whosoever, in good faith, and of loyal resolve have acted for the crushing of this rebellious outbreak, should be indemnified and kept harmless for such their acts of loyalty," the statute goes on in substance to enact, first, that all proceedings civil or criminal, present or future, against such authorities or officers, civil, military, or naval, or other persons, for any thing commanded or done since the publication of martial law, that is from the 13th *October*, 1865, and during its continuance, whether within any district in which martial law was proclaimed or without, in furtherance of martial law, in order to suppress the insurrection and rebellion, and for the preservation of the public peace throughout the island, shall be discharged and made void, and that every person by whom any such act, matter or thing shall have been advised, ordered, directed or done for the purposes aforesaid, during the existence of such martial law, shall be freed and indemnified both against the Crown and against all other persons.

The second provision of the Act has special reference to the present defendant. It is in these terms:—"That his Excellency *Edward John Eyre*, Esq., Captain

General and Governor in Chief, and all officers and other persons who have acted under his authority, or have acted bonâ fide for the purposes, and during the time aforesaid, whether such acts were done in any district in which martial law was proclaimed, or in any district in which martial law was not proclaimed, are hereby indemnified in respect of all acts, matters, and things done in order to put an end to the said rebellion; and all such acts so done are hereby made and declared to be lawful, and are confirmed."

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To this enactment is appended the following remarkable provision. "In order to prevent any doubt which might arise, whether any act alleged to have been done under the authority of the governor, or to have been done bonâ fide in order to suppress and put an end to the said rebellion, was so done, it shall be lawful for the Governor for the time being to declare such acts to have been done under such authority, or bonâ fide for the purposes aforesaid; and such declaration, by any writing under the hand of the governor for the time being shall, in all cases, be conclusive evidence that such acts were so done respectively."

After thus setting forth the Indemnity Act and averring that such Act had duly received the Royal assent and had become part of the law of *Jamaica*, the plea concludes by averring that the alleged grievances in the declaration mentioned were committed in the island of *Jamaica* after the 13th *October*, 1865, and during the continuance of the rebellion, and before the passing of the Act, and were measures used in the suppression of the rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting

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an end to the rebellion, and are included in the indemnity given by the Act.

To this plea there was a demurrer. There was also a new assignment, and a further replication:—First. That the trespasses complained of were committed beyond the territories within which the *Jamaica* Legislature had jurisdiction and authority. Second. That at the time of the passing of the Act of indemnity the defendant was Governor of *Jamaica*, that his assent to the Act was necessary, that his assent had been given, and that by virtue of it the Act had become the law of *Jamaica*. To the latter replication the defendant demurred.

We have first to consider the validity of the defendant's plea.

The plea admits, as it necessarily must do, that the acts complained of were done, and, when done, were wrongful. On the other hand, it cannot be disputed that the *Jamaica* Legislature, having full legislative authority within the limits of the colony, subject only to the assent of the Crown, had full power to pass the statute in question, so far as to take away the right of action before the local tribunals of the island. But it is contended on the part of the plaintiff that a right of action being given before the Courts here in respect of personal wrongs committed in a colony, this right cannot be taken away by an Act having no legislative effect beyond the limits of the local authority.

The argument for the plaintiff may be thus put.

Upon every wrongful act inflicting a personal injury a right of action immediately accrues to the party wronged and becomes a vested right. In the case of a wrong suffered in a colony, a twofold or at all events an alternative right of action arises, namely, a right

not only to sue for redress in the Courts of the colony if redress can be there obtained, but also to sue in the Courts of this country if the wrongdoer can be found within the jurisdiction of the latter. And though the local Legislature may take away the right of action within the limits of its authority, it cannot take away the right of action in this country, inasmuch as no authority save that of the Imperial Legislature can take away the jurisdiction of the Queen's Courts here, or deprive the subject of his right to redress afforded not by virtue of the local law but by virtue of the law of *England*, which gives a right of action in respect of personal injuries suffered in other countries.

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We were much struck with this view, and, the question being one of great importance, we took time to consider our judgment; but, on the fullest consideration we can give to the case, we have come to the conclusion that the foregoing reasoning is unsound, and that on this demurrer the defendant is entitled to our judgment.

It may be useful to consider what would have been the effect if, instead of legislating *ex post facto*, the Legislature of *Jamaica*, in anticipation of future events, had passed a statute authorizing the acts which have given rise to this action. We cannot doubt that in such a case no right of action would arise here. It appears to us clear that where by the law of another country an act complained of is lawful, such act, though it would have been wrongful by our law if committed here, cannot be made the ground of an action in an *English* Court. The rule which obtains in respect of property and civil contracts—namely, that an act, unless intended to take effect elsewhere, shall, as regards its effects and

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incidents, if a conflict of law arise between the *lex loci* and the *lex fori*, be governed by the former—appears to us to be applicable to the case of an act occasioning personal injury. To hold the contrary would be attended with the most inconvenient and startling consequences, and would be altogether contrary to the comity of nations in matters of law to which effect should if possible be given. An act might not only be lawful, but might even be enjoined, by the law of another country, which would be wrongful and give a right of action by our law ; and it certainly would be in the highest degree unjust that an individual who has intended to obey the law binding upon him should be held liable in damages in another country where a different law may prevail. Thus, an arrest and imprisonment might be perfectly justifiable by the law of a foreign country under circumstances in which it would be actionable here. It would be impossible to hold that in such a case an action could be maintained in an *English* Court.

The same reasoning will apply where an act, though not enjoined, is yet authorized and rendered lawful by the law of the country where it is done. There will have been no intention to inflict a wrong in such a case, nor, according to the law of the particular country, will any right have been infringed.

It may be that where an act which, though not authorized by the *lex loci*, yet gives no right of action—as where the act is punishable by criminal proceedings but gives no right to damages, but such act, by the law of this country, would give a right to damages—as in such a case no conflict of laws would arise, an action might be maintained in an *English* Court. The latter question arose in the case of *Scott v. Lord Sey-*

mour (a), but was not decided. *Wightman* J., indeed, when the case was before the Court of Exchequer Chamber, p. 234, expressed an opinion that though no damages might be recoverable in the foreign country where the cause of action arose, damages might be recovered in an *English* Court. The other Judges however declined to rest their decision in favour of the plaintiff on this view, but proceeded on the narrow ground that the plea failed to shew that by the law of *Naples* damages might not be recoverable as incidental to the criminal proceedings alleged by it to be then pending in the *Neapolitan* Court. The case of *Scott v. Lord Seymour* therefore leaves it doubtful whether damages can be recovered in an action here when damages would not be recoverable by the *lex loci*. It would obviously be going much further to hold that an action would lie here in respect of an act warranted by the *lex loci*. The case of *Reg. v. Lesley* (b) is more directly to the purpose. In the latter case the defendant was convicted on a charge of assault and false imprisonment, the facts being that the defendant, the master of an *English* merchant vessel lying at *Valparaiso*, had engaged with the *Chilian* Government to bring to this country certain prisoners condemned to be banished to *England*, and in the course of carrying out this employment had committed the assault and imprisonment complained of. On a case reserved, the Court of Criminal Appeal held that, while the conviction might be supported as to so much of the alleged matters of complaint as had occurred when the ship had left the *Chilian* waters, and might therefore be considered as *English* territory and subject to *English*

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(a) 1 H. & C. 219.

(b) Bell C. C. 220.

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law, yet it could not be upheld in respect of what had been done within those waters, inasmuch as the defendant was there acting under the authority of the *Chilian* Government, and it must be presumed that the latter had exercised its authority according to law, and that what took place within the limits of the *Chilian* territory was consequently lawful. In delivering judgment *Erle* C. J. says, p. 233 :—" Can the conviction be sustained for that which was done within the *Chilian* waters? We answer No. We assume that in *Chili* the act of the Government towards its subjects was lawful; and, although an *English* ship in some respects carries with her the laws of her country in the territorial waters of a foreign state, yet in other respects she is subject to the laws of that state as to acts done to the subjects thereof. We assume that the Government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the Government, and under its authority. In *Dobree v. Napier* (a) the defendant, on behalf of the Queen of *Portugal*, seized the plaintiff's vessel for violating a blockade of a *Portuguese* port in time of war. The plaintiff brought trespass; and judgment was for the defendant, because the Queen of *Portugal* in her own territory had a right to seize the vessel and to employ whom she would to make the seizure; and therefore the defendant, though an Englishman seizing an *English* vessel, could justify the act under the employment of the Queen. We think that the acts of the defendant in *Chili* become lawful on the same principle, and that there is therefore no ground for the conviction." This case, as well as that of *Dobree v. Napier* referred to in the judgment, is an

(a) 2 *Bing. N. C.* 781.

authority to shew that an Act authorized by the law of the country in which it takes place cannot be the subject of a legal proceeding here. In this view, upon principle, as well as upon these authorities, we entirely concur.

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It remains to be seen how far this principle will apply when an act, admitted to have been unlawful where done, is legalized and divested of its tortious character, and immunity is afforded to the wrongdoer in respect of it, by ex post facto legislation. And this, no doubt, is a question of greater difficulty than the one with which we have just been dealing.

We are however of opinion that the same principle which we have stated to be applicable to an act made lawful by prior legislation is equally applicable to an act originally wrongful but legalized by an ex post facto law. Local Legislatures having been established in our colonies, with plenary power of legislation, the same comity which obtains between nations should be extended to them by the tribunals of this country when their law conflicts with ours in respect of acts done within the ambit of their jurisdiction. The same inconvenience as we have before adverted to might otherwise arise in every instance of an Indemnity Act. An unseemly conflict of jurisdiction would occur, and the legislative authority of the local Legislature, in a matter undoubtedly within their competence, would be practically defeated; and the extraordinary anomaly would arise that an inhabitant of a colony, or it might be of a foreign country, owing allegiance to its law, and whose rights arise from and are determined by such law, would be able to enforce rights which by the law of the country to which he more immediately belonged have been taken away from him by a law binding upon

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him. It is unnecessary in the present instance to decide whether, to found an action before an *English* Court, an act must be tortious according to the law of the particular country as well as of this; or whether the act if unlawful by the *lex loci* must give a claim to damages by the latter as well as by our law in order to give a right to damages here; it is enough for the present purpose to say that we are of opinion that the true rule in such a case as the present is, that, where the right of action in respect of an act otherwise wrongful is taken away, before an action has been brought in this country, by a law binding where such wrongful act was done, no action can be maintained here.

We were much pressed on the argument with the objections which readily present themselves, and the force of which it is impossible not to feel, against legislation of this nature. There can be no doubt that every so called Indemnity Act involves a manifest violation of justice, inasmuch as it deprives those who have suffered wrongs of their vested right to the redress which the law would otherwise afford them, and gives immunity to those who have inflicted these wrongs, not at the expense of the community for whose alleged advantage the illegal acts were done, but at the expense of individuals who, innocent possibly of all offence, have been subjected to injury and outrage, often of the most aggravated character. It is equally true, as was forcibly urged on us, that such legislation may be used to cover acts of the most tyrannical, arbitrary and merciless character,—acts not capable of being justified or palliated even by the plea of necessity, but prompted by local passions, prejudices or fears,—acts not done with the temper and judgment which those in authority are

bound to bring to the exercise of so fearful a power, but characterized by a reckless indifference to human suffering and an utter disregard of the dictates of common humanity. On the other hand, however, it must not be forgotten that, against any abuse of the local legislative authority in such a case, protection is provided by the necessity of the assent of the Sovereign, acting under the advice of ministers, themselves responsible to Parliament. We may rest assured that no such enactment would receive the Royal assent, unless it were confined to acts honestly done in the suppression of existing rebellion, and under the pressure of the most urgent necessity. The present indemnity is confined to acts done in order to suppress the insurrection and rebellion, and the plea contains, consequently, the necessary averments that the grievances complained of were committed during the continuance of the rebellion, and were used for its suppression, and were reasonably and in good faith considered by the defendant to be necessary for the purpose; and it will therefore be incumbent on the defendant to make good these averments in order to support his plea. As was observed by Mr. *Mellish* in his most able argument, Indemnity Acts have on several occasions been passed by colonial Legislatures after insurrections or disturbances of natives or slaves, and have received the assent of the Crown by the advice of its ministers. In antient periods of our history more than one such Act has been passed by the *English* Parliament, and at the close of the last century Indemnity Acts were repeatedly passed by the Parliament of *Ireland* during the continuance of the rebellion. Lastly, the Acts of the 43 *G.* 3. c. 117. and 3 & 4 *W.* 4. c. 4., both having reference to the state of *Ireland*, while authorizing

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martial law under given conditions, gave indemnity by anticipation for acts done in the exercise of it. After this frequent resort to Acts of indemnity, and the sanction thus given to them, it is obvious that, although the objections referred to may afford cogent reasons why this species of legislation should not be unduly resorted to or encouraged, they cannot have any influence on our judgment as to how far effect should be given to the Indemnity Act now in question. As we have already said, plenary power to make laws having been conferred on the local Legislature, subject to the assent of the Sovereign, it cannot be disputed that it was within its competence to pass the law referred to in the plea, and the only question is whether the effect of it is to deprive the plaintiff of the right which he would otherwise have had of maintaining an action in this country.

For the reasons we have given we are of opinion that such is its effect, and consequently that on the demurrer to the second plea our judgment must be for the defendant.

It remains only to dispose of the demurrer to the plaintiff's last replication. We have no hesitation in holding such replication to be bad. There is no ground whatever for saying that the governor of a colony cannot give his official consent to a legislative measure in which he may be individually interested. It might as well be asserted that the Sovereign of these realms could not give assent to a bill in Parliament in which the Sovereign was personally concerned.

On both demurrers, therefore, our judgment must be for the defendant.

Judgment for the defendant (a).

(a) See the preceding case.

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The QUEEN *against* TUGWELL.

Thursday,
May 7th.
[Wednesday,
June 10th.]

1. Reg. Gen. *H. T. 7 & 8 G. 4.*, which requires that the objections intended to be made to the title of the defendant in an information in the nature of a quo warranto shall be specified in the rule to shew cause, and that no objection not so specified shall be raised by the prosecutor on the pleadings without leave of the Court or a Judge, applies only to the pleadings, and does not prevent the relator at the trial of the information taking objections not specified in the rule.

2. In elections under stat. 5 & 6 *W. 4. c. 76.* the burgess roll constituted by sect. 22 is conclusive as to the persons entitled to vote, and their qualification cannot be questioned upon quo warranto against a person elected.

3. Stat. 5 & 6 *W. 4. c. 76. s. 32.* requires that the voting paper at an election of councillors shall contain the Christian names and surnames of the persons voted for, with their places of abode and descriptions. By sect. 142 no misnomer or inaccurate description of any person in any voting paper shall hinder the operation of the Act, provided it be such as to be commonly understood. A voting paper contained only the Christian and surname and place of abode of the person voted for. Held, per *Cockburn C. J., Lush J. and Hannen J.* dubitante, that this was not an inaccurate description, and therefore not cured by sect. 142.

4. A burgess who is rated in two wards is not bound to select in which he will be enrolled, and if his name appears on the roll for both may vote in either.

Quo warranto.
Reg. Gen. H.
T. 7 & 8 G. 4.
Election of
town coun-
cillor.
Voting paper.
"Description."
Burgess rated
in two wards.
5 & 6 W. 4.
c. 76. ss. 22.
32. 142.

INFORMATION in the nature of a quo warranto calling on the defendant to shew by what authority he claimed to exercise the office of councillor of the borough of *Scarborough*, in the county of *York*.

Plea. That the borough of *Scarborough* was a body corporate by the name of The bailiffs and burgesses of the borough of *Scarborough*; that within the borough there of right ought to be one mayor, six aldermen and eighteen councillors, to be elected in the manner specified by stat. 5 & 6 *W. 4. c. 76.*; that the borough was divided into two wards, namely, the north ward and the south ward;

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that on the 1st *November*, A. D. 1867, "an election was duly held for the election of three councillors to supply the places of those who went out of office in the south ward; that the defendant was an enrolled burgess and duly qualified to be elected and be a councillor, and that the burgesses of the south ward did elect him to be a councillor; that he was declared to be duly elected, and that he then and there accepted the office.

Replication. That the burgesses of the south ward did not elect the defendant.

Issue.

On the trial, before *Hannen J.*, at the Spring Assizes at *York*, it appeared that at the election of town councillors on the 1st *November*, 1867, to supply three vacancies for the south ward there were six candidates, among whom were *Thomas Jackson*, who was the relator, and the defendant. The defendant was elected by a majority of two votes over the relator, the number of votes given for the former being 281, and for the latter 279. The rule nisi for the quo warranto was obtained on the ground that the election of the defendant was void on account of the reception of votes for him from persons who were not entitled to vote at the election, or who fraudulently personated voters who were not entitled to vote and persons who would but for their death have been entitled to vote, and from a person who had already voted for the north ward. Cause was shewn on counter affidavits, and the Court made the rule absolute. A verdict was entered pro formâ for the Crown, leave being reserved to move to enter the verdict for the defendant.

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In *Easter Term*, *Field* obtained a rule to shew cause why judgment in this prosecution should not be entered for the defendant non obstante veredicto, on the grounds, first, that it was not competent to the relator to go into objections not specified in the affidavits filed in support of the rule nisi for the information or in such rule; second, that it was not competent to the relator to question in a quo warranto the qualification of voters on the burgess roll.

It was agreed that if the Court decided the first point in favour of the relator it should be open to either party on the argument of the present rule to question the validity of certain votes recorded for the other.

R. G. H. T., 7 & 8 G. 4., 1827 :—"Whereas much vexation and expense have been occasioned to defendants in informations in the nature of quo warranto, by the practice of raising issues upon various matters distinct from the ground on which the information was granted by the Court:

"Now for providing a remedy in this behalf, it is ordered, that from henceforth the objections intended to be made to the title of the defendant shall be specified in the rule to shew cause, and that no objection, not so specified, shall be raised by the prosecutor on the pleadings, without the special leave of the Court, or of some Judge thereof." (See 6 B. & C. 267.) In the same Term,

May 7th. *Overend* and *Shepherd* shewed cause.—First. On this issue the relator is not confined to the objections specified in the affidavits on moving for the rule, but may question other votes as well as those which were mentioned in the affidavits. R. G. H. T., 7 & 8 G. 4.,

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is a pleading rule ; *Reg. v. Thomas* (a), per *Coleridge J.*, *Reg. v. Preece* (b), per *Coleridge J.*, *Reg. v. Edye* (c), per Lord *Denman*. [*Blackburn J.* That rule is in its terms and spirit confined to pleading. It was intended to make this information analogous to proceedings under the prerogative writ, in which it was competent for the defendant to plead any number of pleas.]

Secondly. It is objected that if the relator is allowed to question the right of electors to be on the burgess roll he may disqualify persons behind their backs. But on the other hand a person may be on the burgess roll who is not a burgess. The right of a person to have his name placed there depends on his possessing the qualification mentioned in stat. 5 & 6 *W. 4. c. 76. s. 9*. Sect. 18 contains provisions for revising the burgess lists ; by sect. 22 the burgess lists when revised constitute “the burgess roll of such burgesses of the borough entitled to vote,” and by sect. 32 every burgess entitled to vote in the election of councillors may vote in the mode there prescribed. But it is not compulsory on any person at the revision of the lists to object to a person who is disqualified ; or the want of qualification may be overlooked. A quo warranto will not be granted to remove a disqualified person from the burgess roll unless he has exercised the office ; *In re Armstrong* (d). [*Mellor J.* By sect. 18 of stat. 5 & 6 *W. 4. c. 76.* on the revision of the burgess lists the mayor and assessors constituting the revision Court “shall require proof of the qualification of the

(a) 8 *A. & E.* 183. 192.

(b) 5 *Q. B.* 95, note (h).

(c) 12 *Q. B.* 936. 941.

(d) 25 *L. J. Q. B.* 238 ; 8 *C. nom. Reg. v. Armstrong*, 2 *Jur. N. S.* 211.

person so objected to; and in case the qualification of such person shall not be proved to the satisfaction of the Court the mayor shall expunge the name of every such person from the said lists." In *Rawlinson on the Municipal Corporation Act*, 4th ed., by *Welsby*, p. 40, note (1), it is said, "The mayor's decision as to expunging the name was under this section conclusive. See *In the matter of the Mayor of Hythe*" (a), which was decided before stat. 7 W. 4 & 1 W. 4. c. 78. s. 24. I do not know why it should not be final where the name remains by reason of no objection being made to it.] In *Symmers v. The King* (b) Lord Mansfield said the qualification of electors could not be gone into without notice; *Aston J.* did not express any opinion and *Willes J.* differed from Lord Mansfield. In *Rex v. Mein* (c) Lord Kenyon, referring to *Symmers v. The King*, said, "There the electors were members of a corporation, whose titles might have been questioned in *quo warranto* informations," and added, that in cases where the titles of the electors cannot be impeached at all, "of necessity their titles must be attacked by discussing the validity of the election made by them, in a proceeding against the person elected." In *Rex v. Smith* (d) Lord Ellenborough, admitting that the language of Lord Mansfield in *Symmers v. The King* (b) was very strong, said that if the case had turned on the question whether it was competent to impeach, upon a collateral issue concerning the rights of the elected, the title of the elector, he should have desired further time for consideration. In *Rex v. Hughes* (e), which was a *quo warranto* for usurping the

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(a) 5 A. & E. 832.

(b) Cowp. 489.

(c) 3 T. R. 596. 598.

(d) 5 M. & S. 271. 279.

(e) 4 B. & C. 368.

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office of mayor, *Bayley J.*, pp. 377-8, refers to *Symmers v. The King* (a) as a decision that evidence could not be given to impeach the votes of the corporators de facto, and adds, "In *Rex v. Mein* (b), Lord *Kenyon* (who is a very high authority upon such points) says, p. 598, 'It is objected that the titles of electors cannot be impeached through the medium of the elected, and the case in *Cowper* has been relied on: but there the electors were members of a corporation, whose titles might have been questioned in *quo warranto* informations.' He therefore recognizes *Symmers v. Regem*, and takes a distinction between that case and *Rex v. Mein*. These cases were before the 82 G. 2. c. 58. and I certainly do not think that by the 3rd section of that Act it was intended to extend the power of objecting to the titles of corporators, and perhaps it was meant to be applicable to head or presiding officers, although that is certainly made doubtful by the introduction of the word *election*." [*Blackburn J. Holroyd J.*, than whom no Judge was ever more accurate in expressing his meaning, said, p. 379, "It is obvious, that many nice questions may arise as to whether an officer is so de facto or not; sometimes that may be so combined with the question of title de jure, that they cannot be severed. But when a person is in possession of the office, his title cannot be thus questioned:" he puts in the words "de facto," which likens the case to that of a freeholder; if a person is in possession of a freehold he could not object to its being shewn that another person claimed it.] In *Reg. v. Quayle* (c) the title of persons on the roll was allowed to be impeached, Lord *Denman C. J.* saying,

(a) 7 *Cowp.* 489.(b) 3 *T. R.* 596.(c) 11 *A. & E.* 508.

p. 511, "As to opening the burgess roll, the inconvenience may be very great; but it may well be doubted whether there would not be more mischief caused by refusing to do so." [*Mellor J.* In that case the inconvenience of opening the burgess roll was dealt with in a cursory manner by Lord *Denman*, and no other Judge observes upon it.] [They also cited *Reg. v. Parkinson (a)* and *Cole on Quo Warranto*, pp. 221-2.]

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Stat. 32 G. 3. c. 58. s. 3. shews that the Legislature thought the title of the electors might be inquired into through the medium of the elected. In *Grant on Corporations*, p. 214, it is said, "Perhaps, however, the rule is more accurately and precisely stated as follows: that where the qualification of the electors depends on the tenure of a corporate office or place, that qualification cannot be questioned through the medium of proceedings impeaching the title of a person elected by them to any office; but where the qualification depends upon inhabitancy, or any other circumstance, which cannot be directly challenged by a legal proceeding, then, from necessity, it may be questioned and tried through such medium. But, as in corporations, there is almost always some other available mode of trying the right of electors, the Court, it seems, will not, in general, suffer it to be done by the above mode. Thus far, however, the Court will go, where the electors' title has, in a previous proceeding, been shewn to be bad, as if they have been ousted from office on a judgment on *quo warranto*; there that may be shewn in a proceeding against an elected party."

Field and *A. W. Simpson*, in support of the rule.—The

(a) 8 B. & S. 769.

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object of Reg. Gen. *Hil. T.*, 7 & 8 *G. 4.*, was to exclude from the trial at nisi prius questions as to any person not mentioned in the affidavits on which the rule was obtained. Great inconvenience arises from raising objections of which no notice has been given. [*Blackburn J.* The remedy is to apply for particulars.] On preparing indictments a defendant may apply for an order on the prosecutor to give particulars of the acts intended to be proved; *Corner Crown Practice*, p. 148; but there is no such practice in quo warranto informations. In some cases notice of the objections is given by the pleadings; *Reg. v. Hammond (a)*. In *Reg. v. Thwaites (b)* it was held that the objectors were bound by the grounds stated in the rule nisi.

Secondly. The burgess roll cannot be questioned in this proceeding: stat. 5 & 6 *W. 4. c. 76. ss. 15. 17. 18.* contain provisions for making a proper burgess roll; sect. 17 enables every person on any list to object to any other person; and sect. 22 makes the burgess lists revised by the mayor and assessors the burgess roll of the burgesses entitled to vote. The earlier cases support this construction. [They were then stopped.]

BLACKBURN J. The first of the two points now argued must be answered in favour of the relator, the second in favour of the defendant.

The rule for the quo warranto was granted upon affidavits specifying grounds which were, in substance and effect, that though the defendant apparently had a majority it would be shewn, on a scrutiny, that he had not a real majority, and the relator having made out a

(a) 17 *Q. B.* 772.

(b) 1 *E. & B.* 704.

primâ facie case on the affidavits the rule was made absolute; and an information was filed, to which there was a plea; and to that plea a single replication, viz., that the burgesses did not elect the defendant, on which issue was taken. At the trial the contention was that the relator was confined to the objections specified in the affidavits in support of the rule or in the rule itself. That contention rested on R. G. H. T., 7 & 8 G. 4., and it is necessary to see what its object was. A statute passed after the Revolution, 9 Ann. c. 20. s. 4., enacted that in case of the usurpation of a corporate office the Master of the Crown Office should, *with the leave of the Court*, exhibit an information in the nature of a quo warranto. The Court have always exercised a discretion in granting this leave, and required that it should be shewn that there was something wrong in the defendant exercising the office, that the objections were fit and proper to be made, and that the relator himself was not disqualified. But when the Court, being satisfied that there was a good objection, in the exercise of its discretion granted leave upon one point, the relator might start a number of other objections which the Court never intended to be raised, and on which, in its discretion, it would not have given leave to file the information, and, the Crown not being subject to the rule against duplicity in pleading, there were replications without stint traversing all the allegations in the plea and raising all kinds of objections, to the great expense and annoyance of the person holding the office in question. The books swarm with instances of this abuse; and *Rex v. McKay*(a) is an instance where there were sixteen

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(a) 4 B. & C. 351.

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general replications putting in issue the facts stated as inducement to the defendant's traverse, and thirty special replications setting up various customs as to the election or appointment of bailiff of the borough, which office the defendant was alleged to have usurped. The object of the Reg. Gen. was to provide a remedy for this abuse. It does not say that no evidence shall be given of any objection not specified in the rule, nor does it contain any regulation as to evidence. The effect of it is that, if without the leave of the Court or a Judge the relator raises on the record any objections to the title of the defendant not specified in the rule, the replications will be struck out. The contention for the defendant is, that the effect of the Reg. Gen. is to limit the relator to particular pieces of evidence; but that would be equivalent to saying that when a single issue is raised the relator shall not have a verdict, though evidence relevant to the issue was tendered. If the rule for the quo warranto is so vague that the defendant may be prejudiced, the relator should be required to give particulars of the objections and be confined to those; and by parity of justice and reasoning the defendant also should give particulars if he intends to meet the case of the relator by new objections. I have no doubt they would be ordered, and my impression is that there are cases in which that has been done.

Secondly. It is contended that a certain number of voters ought to have been refused, though their names were on the burgess roll, on the ground that they remained there either because no person objected to them, or because, being objected to, the mayor and assessors decided wrongly against the objection. Without inquiring into previous decisions, which are not quite

consistent, the scheme of stat. 5 & 6 *W.* 4. c. 76. is, that the burgess roll shall be conclusive, so that no person off it shall vote, and the vote of any person on it shall not be questioned. Sect. 9 having defined the qualification of persons entitled to be enrolled as burgesses, sect. 15 enacts that the burgess list shall be made out by the overseers and published, and as they may make mistakes provision is made by sect. 17 that every person omitted may claim to have his name inserted, and give notice thereof, and every person inserted may object to any other person inserted as not entitled, and give notice of objection. A list of the claims and objections is to be made out and published; and by sect. 18 the mayor and assessors, on due proof of the claim, shall insert the name of the claimant, and retain the names of all persons to whom no objection shall have been made and the names of every person against whom an objection made is not supported, and strike out the names of all persons who, being objected to, do not duly prove their qualification. And by sect. 19 the mayor and assessors shall, in open Court, determine upon the validity of the claims and objections and sign the lists. By sect. 22 the lists so revised and signed are to be copied in a book, and that book is to be "the burgess roll of the burgesses of such borough entitled to vote." Therefore the Act carefully provides opportunities for correcting mistakes in the lists, and that the burgess roll thus made out shall contain the names of all persons entitled to vote, and that it shall not afterwards be questioned. Sect. 9, which enacts that every person with certain qualifications shall, "if duly enrolled," be a burgess, rather weakens the effect of sect. 22. But

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reading that section in combination with the other enactments, and considering the object of having the burgess roll as the register of voters without further trouble or expense, I am of opinion that it is conclusive.

The only authority against this is what was said incidentally by Lord *Denman* in *Reg. v. Quayle (a)*. But the greater reasons against opening the burgess roll and the silence of stat. 5 & 6 *W. 4. c. 76.* prevail in favour of the construction that it shall not be opened.

MELLOR J. I agree in the construction of R. G. *H. T., 7 & 8 G. 4.,* and in its application to the present case.

On the second point. All the reasons are in favour of the burgess roll being conclusive as to the right to vote. Complete provision is made by stat. 5 & 6 *W. 4. c. 76.* for determining the validity of all claims and objections, and ensuring that the roll as revised shall truly represent all the persons qualified and entitled to vote. The words of sect. 22, "every such book in which the said burgess lists shall have been copied shall be the burgess roll of the burgesses of such borough entitled to vote," are strong to shew that when once made it is conclusive. Although there is a change of phrase in the 9th section the reasonable interpretation of the sections from the 15th to the 22nd is that an easy remedy is given by which the lists shall be purged and made correct. The principle on which in the cases cited the title of electors was allowed to be questioned on quo warranto is that there was then no other mode in which

(a) 11 *A. & E.* 508. 511.

that could be done. Now there is, and, therefore the construction we put on sect. 22 is in analogy with the cases.

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HANNEN J. I do not think that R. G. H. T., 7 & 8 G. 4., is applicable to the present case. The objections specified in this rule are [his Lordship read them]. The construction contended for by Mr. *Field* is that the particular cases meant to be brought forward in support of the rule should be stated. But it was only intended that the classes of objection should be stated, and, if the statement was calculated to mislead, that objection should be taken at once in order that the rule might be framed in a more particular form. If that is not required all the evidence in support of the terms of the rule nisi may be given at the trial, otherwise it would be open to one side to raise any number of objections and impossible on the other side to go into any objections not specified in the affidavits. *Reg. v. Thwaites (a)* is not inconsistent with this view. The rule in that case was discharged on the ground that the affidavits answered the objection to the rule, and then nothing more remained; but if they had not been an answer, and the quo warranto had issued, there is nothing to shew that the relator would not have been allowed to adduce additional evidence in support of his objections.

On the second point the whole purview of the sections of stat. 5 & 6 W. 4. c. 76., which contain elaborate provisions for ascertaining the validity of claims and objections and inserting and expunging names, is to make what

(a) 1 E. & B. 704.

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is done for forming the burgess roll conclusive and not subject to be afterwards questioned.

It was ordered that the rule stand over till the next Term in order that the effect of this decision might be inquired into.

The result of the inquiry was that it was necessary to bring before the Court various objections to the voting papers. One class was that in nine of the voting papers for the relator his name and residence only were given; he was a Doctor of Medicine, but was not described as such or of any other calling. There was no other candidate of that name.

Stat. 5 & 6 *W. 4. c. 76. s. 32.* enacts that every election of councillors shall be conducted in manner following, "that is to say, every burgess entitled to vote in the election of councillors may vote for any number of persons not exceeding the number of councillors then to be chosen, by delivering to the mayor and assessors or other presiding officer as hereinafter mentioned a voting paper, containing the Christian names and surnames of the persons for whom he votes, with their respective places of abode and descriptions, such paper being previously signed with the name of the burgess voting, and with the name of the street, lane, or other place in which the property for which he appears to be rated on the burgess roll is situated."

The interpretation clause, sect. 142, enacts "that no misnomer or inaccurate description of any person, body corporate, or place named in any Schedule to this Act annexed, or in any roll, list, notice, or voting paper required by this Act, shall hinder the full operation of this Act with respect to such person, body corporate, or

place, provided that the description of such person, body corporate, or place be such as to be commonly understood."

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June 10. *Overend* and *Shepherd*, for the relator.—
First. The relator was sufficiently described in the voting papers. The question is whether sufficient information was given; *Reg. v. Coward* (a), *Reg. v. Hammond* (b), *Reg. v. Avery* (c), *Reg. v. Gregory* (d), *Reg. v. Thwaites* (e), *Reg. v. Spratley* (f), *Reg. v. Bradley* (g). At any rate the description was one which was commonly understood and therefore is cured by sect. 142.

Field and *A. W. Simpson*, in support of the rule.—
The votes were insufficient, as there was no "description" of the person in the voting papers. [*Lush J.* Suppose "surgeon" was written after the name. *Cockburn C. J.* Or "medical practitioner" or "chemist." If "perfumer" was written when the person was a "butcher" it would not be sufficient. But sect. 142 says no inaccurate description of any person shall hinder the full operation of the Act with respect to such person "provided that the description be such as to be commonly understood." Suppose a person well known from his rank or the office he fills, if there is equal certainty as to the person voted for, whether the occupation is added or not, it seems strange to say that either way should not be sufficient. *Lush J.* What is generally understood, when no occupation is stated, or the addition of Esquire is given?]

(a) 16 Q. B. 819.

(b) 17 Q. B. 772.

(c) 18 Q. B. 576.

(d) 1 E. & B. 600.

(e) 1 E. & B. 704.

(f) 6 E. & B. 363.

(g) 3 E. & E. 634.

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The Legislature has guarded the voter from being misunderstood, and requires that the matter shall be put beyond doubt. Also there is a difference between an inaccurate description of an existing thing and no description at all. [*Lush J.* Suppose in the column headed "Occupation" the voter writes "none," would not that be an inaccurate description of a person who has one? The word "description" in sect. 32 may be used in a different sense from the same word in sect. 142; in the latter it is used in a compendious sense including everything which goes to make up the description of the person voted for.] In *Reg. v. Coward (a)* it was held that sect. 142 applies only where there is an inaccurate description of a right place, not where there is an accurate description of a wrong place; per *Patteson J.*, p. 829 (*b*). [They also cited *Reg v. Hammond (c)*.] Stat. 22 *Vict. c. 35. s. 6.* provides that the nomination paper shall state the Christian and surnames of the persons nominated, "with their respective places of abode and descriptions;" and sect. 7 provides that it may be in the Form in Schedule A., which gives a separate column headed "Description of person nominated."

COCKBURN C. J. I have reluctantly come to the conclusion that these nine votes must be struck off the number given for the relator, though there cannot be the slightest doubt that everybody understood which candidate was voted for. Stat. 5 & 6 *W. 4. c. 76. s. 32.* enacts that the voting papers shall contain, among other things, a description of the candidate; and in the voting papers before us there is an entire omission of such de-

(a) 16 *Q. B.* 819.

(b) See *Melbourne*, appt., *Greenfield*, respt., 7 *C. B. N. S.* 1.

(c) 17 *Q. B.* 772.

tion. Sect. 142 contains an enactment that no inaccurate description of any person named in any voting paper shall hinder the full operation of the Act, provided the description be such as to be commonly understood. If the voting paper had said that the person voted for had no occupation it might be sufficient. But the enactment is not large enough to embrace a total omission. The same question would arise with reference to the nomination papers under stat. 22 *Vict. c. 35. s. 6*. In that case it might be of vast importance to state clearly for whom the electors were called upon to vote, and the same strictness must be required in the voting papers (a).

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LUSH J. It is an admitted fact that the description given in these voting papers is in its entirety such that there could be no doubt as to the person voted for. The question is, whether the enactment in sect. 142 cures the alleged defect. I am disposed to take the word "description" in the proviso in sect. 142 in a larger sense, and to hold that an omission to state the occupation of the person constitutes an inaccurate description if together with his residence it is sufficiently accurate for the purpose of ascertaining the person voted for. But I have not so strong an opinion as to induce me to dissent from the judgment of the Court.

HANNEN J. I also have been reluctant to come to the conclusion that these votes must be disallowed, and have struggled hard against it. But the same question

(a) By sect. 16 of stat. 22 *Vict. c. 35*. the statute is to be construed as if its provisions formed part of stat. 5 & 6 *W. 4. c. 76*.

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might arise on the nomination papers under stat. 22 *Vict. c. 35. s. 6.*; and if a nomination paper omitted the description of the occupation of the person nominated I cannot think it would be sufficient. On that ground, and in order that we may lay down a definite and simple rule on this matter, I hold that these voting papers are bad.

On the part of the relator objection was then made to the vote of *John Inship*, on the ground that he occupied premises in the north and south wards, and was on the roll for both. At the election he voted in the south ward for the defendant, not having previously voted in the north ward. It was objected that, according to sect. 44 of stat. 5 & 6 *W. 4. c. 76.*, he ought to have been enrolled for one ward only.

Stat. 5 & 6 *W. 4. c. 76. s. 44.* enacts, "that every burgess of any borough shall be entitled to vote in the election of the councillors and assessors to be chosen within that ward in which the property of such burgess for which he appears to be rated on the burgess roll for the time being of such borough shall appear to be situated, and not otherwise; and if any burgess shall be rated in respect of distinct premises in two or more wards, then he shall be entitled to be enrolled and to vote in such one of the said wards as he shall select, but not in more than one."

Overend (*Shepherd* with him) then contended that the burgess was not entitled to be enrolled for both wards, and therefore his vote was bad; stat. 5 & 6 *W. 4. c. 76. s. 44.* At the revision of the lists *Inship* ought not to

have been retained in more than one ward; and he should then have selected the ward in which he would be enrolled on the burgess roll; *Reg. v. The Mayor of Cambridge* (a), *Reg. v. Morton* (b), in which latter case it was admitted that a person could not vote for a ward after having selected another ward to vote in on a former election. [*Lush J.* He has a double qualification, and it would be very hard that he should lose both and be disfranchised because he was enrolled in two wards. He holds a good vote in either ward; it is not imperative on him to make his election in which ward he will vote until the election.]

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Field (A. W. Simpson with him), *contra*, were not called upon.

The Court (COCKBURN C. J., LUSH and HANNEN JJ.) having decided this objection against the relator, he was placed in a minority, and no other point was argued.

Rule discharged (c).

(a) 1 E. & E. 210.

(b) 4 Q. B. 146.

(c) See the next case.

[1869.]

[Tuesday,
May 11th.]The QUEEN *against* PLENTY (a).

*Municipal
Corporation.
Election of
councillor.
Voting paper.
Misnomer.
5 & 6 W. 4.
c. 76. ss. 32.
142.*

At an election of councillors under stat. 5 & 6 W. 4. c. 76. s. 32. voting papers designated the person voted for by the initial of his Christian name. Held misnomers, and therefore cured by sect. 142.

INFORMATION in the nature of a writ of quo warranto to try the validity of the election of the defendant as councillor of the borough of *Newbury*, in the county of *Berks*, as against *William Penford*, at the election of councillors of that borough, held on the 1st *November*, 1867.

Plea, that the burgesses of the borough elected and chose the defendant to be a councillor, and that he was duly elected a councillor and was a councillor of the borough.

Replication traversing these allegations.

Issue.

By order of a Judge a case was stated for the opinion of this Court.

Newbury is a borough mentioned in stat. 5 & 6 W. 4. c. 76. Schedule A. Section 2. The Corporation consists of a mayor, four aldermen and twelve councillors.

On the 1st *November*, 1867, an election of four councillors to supply the places of the like number who then went out of office was duly held according to the provisions of that Act and of The Municipal Corporation Act, 1859, 22 *Vict.* c. 35., before the mayor and assessors of the borough, at which election the defend-

(a) See the preceding case.

ant and *W. Penford*, and three other persons, being duly qualified, were nominated.

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The town clerk duly caused the Christian names and surnames of the defendant and *W. Penford* and the other persons nominated, with the statement of their respective places of abode and descriptions, and with the names of the parties nominating them respectively, to be printed and placed on the door of the Town Hall and in some other conspicuous parts of the borough as required by the 6th section of The Municipal Corporation Act, 1859.

No person bearing the surname of the defendant or *Penford* was nominated other than the defendant and *William Penford*, and at the time of the election the defendant and *William Penford* were the only persons bearing the surnames of *Plenty* and *Penford* respectively who were duly enrolled burgesses of the borough or qualified under the provisions of stat. 5 & 6 W. 4. c. 76.

At the conclusion of the election the mayor and assessors declared the other three candidates and the defendant to be the four elected as councillors, the defendant having a majority of one above *William Penford*. The defendant accepted and used and exercised the office of councillor. Among the persons who voted at the election and delivered voting papers for the defendant were two who were not on the burgess roll nor entitled to vote at the election, and, if their votes were deducted from the total number of voting papers delivered in favour of the defendant, *William Penford* had a majority of one as against the defendant, each of the other three candidates being admitted to be duly elected, subject to the following question as to the form of the voting papers.

[1869.]

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At the election thirty-five of the burgesses who were entitled to vote, and voted, delivered to the mayor and assessors voting papers containing the full surname but only the initial letter of the Christian name of *William Penford*, for whom they voted, and delivered no other voting paper; and eighteen of the burgesses who were entitled to vote, and voted, delivered to the mayor and assessors voting papers containing the full surname but only the initials of the Christian names of the defendant for whom they voted and delivered no other voting paper.

If the thirty-five and eighteen voting papers were not invalid by reason of their being only initialed, but are to be counted as good votes, *William Penford* had a majority of votes at the election over the defendant and was entitled to be elected a councillor of the borough instead of the defendant. If on the other hand the voting papers were invalid, and were not to be counted as good votes, then the defendant had a majority of votes and was duly elected.

The question for the opinion of this Court was, whether the voting papers were invalid by reason of such initials.

Stat. 5 & 6 W. 4. c. 76. s. 32. enacts that "every burgess entitled to vote in the election of councillors may vote for any number of persons not exceeding the number of councillors then to be chosen, by delivering to the mayor and assessors or other presiding officer as hereinafter mentioned a voting paper, containing the Christian names and surnames of the persons for whom he votes, with their respective places of abode and descriptions, such paper being previously signed with the name of the burgess voting, and with the name of the street, lane, or

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other place in which the property for which he appears to be rated on the burgess roll is situated."

[1869.]

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PLENTY.

Sect. 142 enacts "that no misnomer or inaccurate description of any person, body corporate, or place named in any Schedule to this Act annexed, or in any roll, list, notice or voting paper required by this Act, shall hinder the full operation of this Act with respect to such person, body corporate, or place, provided that the description of such person, body corporate, or place be such as to be commonly understood."

The case was argued in this Term, *April* 28, before LUSH, HANNEN and HAYES JJ.

A. Rogers (*Baylis* with him), for the relator, referred to stats. 5 & 6 *W. 4. c. 76. ss. 32. 142.*, 22 *Vict. c. 35. s. 6.*, *Reg. v. The Mayor of Hartlepool (a)*, per *Erle J.*, cited in *Reg. v. Avery (b)*, *Reg. v. Thwaites (c)*. Here could be no mistake as to the person voted for.

Gray, contra.—Stat. 5 & 6 *W. 4. c. 76. s. 32.* makes a distinction between the *signature* of the burgess voting and the *name* of the person for whom he votes. The voting paper is to be "signed with the name of the burgess voting;" and accordingly in *Reg. v. Avery (b)* it was held no valid objection that the Christian name of the voter was denoted only by an initial, there being enough to shew what the real name was. But the voting paper is to contain "the Christian names and surnames of the persons for whom he votes." The Judges who in *Reg. v. Bradley (d)* held that the contractions *Wm.* and *Willm.* might be used in a voting

(a) 2 *L. M. & P.* 666.(b) 18 *Q. B.* 576. 585.(c) 1 *E. & B.* 704.(d) 3 *E. & E.* 634.

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paper as equivalent to *William*, assumed that an initial would not be a compliance with the statute; and *Hill J.* expressly said, p. 640, "Although an initial cannot be regarded as a Christian name, a well known contraction of a name, which cannot be misunderstood, may be so regarded, and is tantamount to the name in full." [*Lush J.* The question is as to the intention of the voter: here he never intended to represent any but the real name. *Hannen J.* Suppose the abbreviation were *Ed.*, which represents *Edward* as well as *Edmund*. *Lush J.* If the abbreviation was *wrong* it would be cured by the interpretation clause; it is strange that it should not be cured if it is ambiguous. Suppose the person voted for has two Christian names and the voter inserts one only in the voting paper?] That would not require to be cured. [*Hayes J.* Here is not a total want of a Christian name. The voter by writing *W.* began to give the right Christian name but stopped short of doing so. *Lush J.* The voter may not know what the full Christian name of the person he votes for is; that person may have always signed his Christian name by the initial letter.] In order to comply with the statute the voter must inquire what Christian name the initial represents. If it was found as a fact that he supposed *Wm.* was the full Christian name it would be cured by sect. 142; but here the voter makes a mistake in law, and that is not cured. [He cited *Eidsforth*, appt., *Farrer*, respt. (a), per *Maule J.*, *Melbourne*, appt., *Greenfield*, respt. (b), *Reg. v. Coward* (c), per *Erle J.* [*Hayes J.* Suppose a defendant before stat. 3 & 4 *W.* 4. c. 42. s. 11. sued by the Christian name of *W.*, he might

(a) 4 C. B. 9. 918.

(b) 7 C. B. N. S. 1.

(c) 18 Q. B. 819. 830.

have pleaded in abatement on the ground of misnomer.] The initial of the Christian name is technically a misnomer; but not within the meaning of sect. 142 of stat. 5 & 6 *W. 4. c. 76*. In cases not provided for by stat. 3 & 4 *W. 4. c. 42. ss. 11. 12.* a single letter representing the Christian name has been held sufficient, on the assumption that it might be the Christian name used by the person (*a*). [*Hannen J.* The holding a single letter sufficient was a great straining of words, because nobody supposed it was the actual Christian name.

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A. Rogers, in reply.—If this is not a misnomer it is something less—merely a misstatement, and therefore cannot vitiate the voting paper. All the cases cited were decided before stat. 22 *Vict. c. 35.*, which requires that at the election of councillors there shall be nomination papers which shall state “the Christian names and surnames of the persons nominated, with their respective places of abode and descriptions;” no burgesses so nominated can be voted for except those. [*Lush J.* The same question might arise as to a nomination paper. Suppose the initial only of the Christian name was given, would it be good?] Yes, provided there was no other candidate of the same surname. [*Lush J.* Suppose two candidates whose surnames were the same, and Christian names had the same initial, how would it be “commonly understood” which of the burgesses nominated was voted for? *Hannen J.* The place of abode or occupation might distinguish them.]

(*a*) See *Nash v. Calder*, 5 *C. B.* 177, 178, per *Maule J.* *Lomax v. Landells*, 6 *C. B.* 577. *Kinnersley v. Knott*, 7 *C. B.* 980. *Reg. v. Dale*, 17 *Q. B.* 64. 66.

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The Legislature has provided for as great accuracy as is practicable. In *Reg. v. Avery* (a) Lord Campbell said, p. 579, "You are not driven to contend that the surname alone would be sufficient. It may be said that the initials are a short way of stating the Christian name." And p. 585, "It is admitted that a contraction of the name would be sufficient; what is an initial but a contraction, though less distinct than other contractions sometimes are?" And Erle J. said, p. 586, "It is a proper general rule, in considering the exercise of rights under this statute, to inquire whether, according to common understanding, the party has expressed an intention to exercise them."

Cur. adv. vult.

HANNEN J.¹ now delivered the judgment of the Court.

The question in this case is, whether *William Penford* was in *November*, 1867, duly elected a councillor for the borough of *Newbury*. It appears from the case that he was so elected if he was entitled to count as valid certain voting papers in which he was designated by the initial of his Christian name, thus, *W. Penford*, instead of by his Christian name and surname in full.

By the 32nd section of The Municipal Corporations Act, 5 & 6 W. 4. c. 76., it is enacted, that every burgess entitled to vote in the election of councillors may vote by delivering a voting paper "containing the Christian names and surnames of the persons for whom he votes, with their respective places of abode and descriptions." The interpretation clause, sect. 142, enacts "that no misnomer or inaccurate description of any person, body

(a) 18 Q. B. 576.

corporate, or place" named in any voting paper required by this Act, shall hinder the full operation of this Act, "provided that the description of such person, body corporate, or place be such as to be commonly understood."

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We are of opinion that the voting papers in question were valid on the ground that the designation of the person voted for by the initial of his Christian name is a "misnomer," and is therefore cured by the interpretation clause.

It was contended for the defendant that where the initial only is used there is a total omission of the name, which is not cured by the interpretation clause; and in support of this contention the case of *Reg. v. Bradley* (a) was referred to, where *Hill J.* says, p. 640, that "an initial cannot be regarded as a Christian name." The question for consideration there was, whether the abbreviation *Wm.* or *Willm.* for *William* vitiated the vote, and the Court held that it did not; the dictum referred to was therefore not necessary for the decision of the case.

The initial *W.* is certainly intended as an abbreviation of some name or other; its defect is that it may be taken to be an abbreviation of any one of the other names beginning with it, such as *Walter* instead of the right one *William*, but if any one or even all of the wrong names which it might be mistaken for were written in full this would certainly be cured: this being so, it is impossible to suppose that the Legislature did not intend to include under the term "misnomer" an abbreviation which could be, and in this case undoubtedly was, understood to indicate the correct name.

(a) 3 E. & E. 634.

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We are of opinion that the word "misnomer," which means a naming amiss, is wide enough to cover the faulty indication of a Christian name by means of the initial. See *Bac. Abr. tit. Misnomer and Addition*, (F.)

This construction has already been put upon the word "misnomer" in another statute. By stat. 3 & 4 W. 4. c. 42. s. 11. it is enacted, that no plea in abatement for a misnomer shall be allowed in a personal action, but that in all cases in which a misnomer would but for that Act have been by law pleadable in abatement the defendant shall be at liberty to cause the declaration to be amended upon summons. In the case of *Rust v. Kennedy* (a) it was sought to set aside the writ and declaration for irregularity, on the ground that the defendant was described by his initials only, the action not being on a bill of exchange or other written instrument. It was there contended, as here, that it was not a mere case of misnomer, because the initials were no name at all; but *Parke B.* pointed out that before stat. 3 & 4 W. 4. c. 42. this was an objection which was pleadable in abatement as a misnomer, and that since that Act the only remedy was by summons, and that this case was within the statute.

Our judgment will therefore be for the relator.

Judgment for the Crown.

(a) 4 M. & W. 586.

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Ex parte BEAL, in re BEAL, appellant, GRAVES,
respondent.

Thursday,
April 23rd.

Copyright.
Registration.
25 & 26 Vict.
c. 68. ss. 4. 6.
Description of
subject.
Copy of copy.
Penalty.

In proceedings taken under stat. 25 & 26 Vict. c. 68, held:

1. The object of the statute is that enough be stated in the register of copyright to identify the picture, &c., and whether the description of the subject-matter is sufficient for this purpose is a question of fact for the tribunal.

2. It is no defence under this Act that the copy was made or sold, &c. under a bona fide belief that the consent of the proprietor had been obtained, though it is ground for the infliction of a merely nominal penalty.

3. It is immaterial whether the copy of a painting, drawing, or photograph, as the case may be, is made by means of a painting, or of a drawing, or of a photograph.

4. If the design of a picture, &c. is made in violation of the statute, it is immaterial whether this is done directly from the original, or indirectly through the medium of a copy.

5. The sale of every copy made in violation of the Act is the subject of a distinct penalty, although there is only one sale.

THIS was an application for a rule under stat. 20 & 21 Vict. c. 43. s. 5. calling on Sir Robert Carden, an alderman and justice of the city of London, and the respondent to shew cause why a case should not be stated for the opinion of this Court.

Thirty-four informations under stat. 25 & 26 Vict. c. 68. were preferred against the appellant, on eight of which the respondent failed. Of the remaining twenty-six informations

1. Fourteen alleged that the defendant, not being the proprietor of the copyright, knowingly sold copies of a painting in oils entitled "Ordered on Foreign Service."

2. Eight more alleged the same of a painting in oils entitled "My First Sermon."

3. Four more alleged the same of a photograph entitled "My Second Sermon."

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The registration of the copyright in each of the cases was proved by a certified copy described as above received from the proper officer. The appellant had on two occasions knowingly sold copies of the designs of each of the works. Those copies were taken by photography from impressions of the engraved plates.

On these informations the appellant was convicted, and sentenced to pay a penalty of 5*l.* for each offence, or in default three months imprisonment.

The appellant paid the money under protest and applied for a case for this Court, which application the magistrate refused as frivolous.

The question turned on the construction of the stat. 25 & 26 *Vict. c. 68.*, entitled "An Act for amending the law relating to copyright in works of the fine arts, and for repressing the commission of fraud in the production and sale of such works," which enacts as follows:—

Sect. 4. "There shall be kept at the Hall of the Stationers' Company, by the officer appointed by the said Company for the purposes of" stat. 5 & 6 *Vict. c. 45.* "a book or books, intituled 'The register of proprietors of copyright in paintings, drawings, and photographs,' wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject

of such work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph of the said work, and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration."

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BEAL, &c.

Sect. 6. "If the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colorably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, &c., any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the *United Kingdom*, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported; &c., any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding 10% ;" &c.

Francis, in support of the application.—These convictions raise three important questions, on each of which a case ought to have been granted.

First. The registration of these productions does not comply with the statute, the object of which was to indicate to all persons the matters with which they must

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the memorandum of registration is to contain a short description of the nature and subject of the work. Mr. *Francis* argues that the intention of this is like that of the registration of a patent, viz., to give notice to every one of certain things which he is not to do. But that is not the object. Penalties are imposed on persons who copy the works of others. The person who does so must in most cases know that he is pirating from some one. No doubt there is the conceivable case where he does this because he is told by another person who has no authority that he may do so; and if he does this with bona fides the penalty should be reduced to a nominal sum. Then, in the case where a man sells copies of a work not made by himself but by others, the statute says this must be done *knowingly*. The object of the Legislature was that there shall be such a description of the subject as will be sufficient to *identify* it. For this purpose the conventional name applied to it will in general hardly be sufficient: there should be description of the subject; and whether there is or not is a question of fact for the tribunal. Taking that as the question which was before the justice in this case, and importing our own knowledge of these pictures which we have all seen, the description of the subject of the first is evidently that of an officer ordered abroad and taking leave of his friends. So of the second and third: who could reasonably doubt that what was intended to be represented was a child looking with eyes wide open at its first sermon, and fast asleep at the second? Some cases were suggested in the argument in which I do not say there might not be some difficulty. As for instance the figure of a dog, described as "A Distinguished Member of the Humane Society." So also of a bullfinch and a couple of squirrels, described

as "Piper and a Pair of Nut Crackers." There it would be right to put a short description of the subject, or at all events wise to give more than the name. But the question here is, does what is given earmark the picture?

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The next question is this: it appears that these pictures belonged to the respondent, who made an engraving of them, but not that he then gave others the right to multiply copies, and it is argued that making a photograph of the engraving is not photographing or copying the picture. But when you copy the design it is immaterial whether you do it directly from the original, or indirectly through the medium of a copy. If indeed the owner had parted with the right to multiply engravings it would be otherwise.

Then a doubt was suggested from the bench that there might be a difficulty arising out of the language of sect. 6 of the Act, "the author of any painting, drawing, or photograph." The doubt was whether, taking those words *reddendo singula singulis*, they might not mean where a painting is made which is the copy of another painting, a drawing which is the copy of another drawing, or a photograph which is the copy of another photograph. But look at the beginning of sect. 1, which is the key to the whole statute. That enacts, that the authors of paintings, drawings, and photographs "shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death." When the copyright is in such very extensive terms, and the penalty follows

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on infringement, it is plain that the photograph of a painting, or the photograph of a drawing of a painting, or the photograph of a photograph, equally come within the Act, and are infringements of the copyright.

The only remaining question turns on the language of stat. 25 & 26 *Vict. c. 68. s. 6.* If any person "shall sell, &c. *any* repetition, &c., of the said work, &c." he shall "for every such offence" forfeit a sum not exceeding 10*l.* Here twenty-six copies were offered for sale, and Mr. *Francis* contends that, as the appellant offered several copies for sale at one time, each such sale is only one offence. In *Brooke v. Millikin (a)*, on which he relies, the words of the Act 12 *G. 2. c. 36. s. 1.* were, it shall not be lawful to import or bring into this kingdom for sale any book first composed or written and printed and published in this kingdom, and reprinted in any other place whatsoever; and if any person knowing the same to be so reprinted or imported shall sell, publish, or expose to sale, any such book or books, he shall forfeit the said book or books, and the same shall be forthwith damasked, and made waste paper; and "such offender or offenders shall forfeit the sum of 5*l.*, and double the value of every book which he or they shall so import, &c., or shall knowingly sell &c.," together, with costs. In that case there could be no reasonable doubt that 5*l.* was the penalty imposed, and that the forfeiture of double the value of each book was a cumulative penalty. But here the words of the Act are that the penalty shall be inflicted for selling, &c. "*any* repetition." And look at the nature of the thing. It would be a monstrous absurdity if a man might import a cargo of pirated works from *France* and 10*l.* be the utmost penalty that could be imposed. Such a state of the law would render

(a) 3 *T. R.* 509.

it worth a man's while to do wrong. The Legislature however were dealing with an offence which they knew was likely to be committed in a wholesale way. If a man sells ten pirated copies at once that makes ten offences, as much as a man who utters ten bad shillings at one time is guilty of ten utterings of false coin.

This rule must therefore be refused.

MELLOB and LUSH JJ. concurred.

Rule refused (a).

(a) See *Reg. v. Scott*, 4 B. & S. 368.

BUTCHER *against* HENDERSON.

Thursday,
May 7th.

The plaintiff commenced an action of trespass before the 20th August, 1867, on which day The County Courts Act, 1867, 30 & 31 Vict. c. 142., received the royal assent, and recovered at the Summer Assizes a verdict for less than 5*l.*; but title to land came in question. The Judge before whom the cause was tried did not certify on the record for costs under stat. 13 & 14 Vict. c. 61. s. 12., nor did the plaintiff obtain an order from a Judge for that purpose under stat. 15 & 16 Vict. c. 54. s. 4. before the 1st January, 1868. On that day stat. 30 & 31 Vict. c. 142. came into operation, by which stat. 13 & 14 Vict. c. 61. s. 12. and 15 & 16 Vict. c. 54. s. 4. were repealed. Held,

1. That the plaintiff having, under stat. 13 & 14 Vict. c. 61. ss. 11. 12., become entitled to judgment for the amount of the verdict and no costs unless he obtained an order under stat. 15 & 16 Vict. c. 54. s. 4., the repeal of these statutes did not enable him to sign judgment for costs under the Statute of Gloucester, 6 Edw. 1. c. 1.

2. That stat. 15 & 16 Vict. c. 54. s. 4. being repealed, the Court had no power to make an order for costs.

3. *Semble*, that stat. 13 & 14 Vict. c. 61. s. 11. was a repeal of the Statute of Gloucester as to those actions commenced after the passing of that Act to which it was applicable, and the repeal of stat. 13 & 14 Vict. c. 61. s. 11. by stat. 30 & 31 Vict. c. 142. s. 33. did not revive the Statute of Gloucester as to those actions; and therefore if the plaintiff had not been in a condition to sign judgment till after the repeal of stat. 13 & 14 Vict. c. 61. s. 11. he would not be entitled to judgment for his costs.

4. *Restall v. The London and South Western Railway Company*, 37 L. J. Exch. 89; L. R. 3 Exch. 141, departed from: *Morgan v. Thorne*, 7 M. & W. 400, followed.

Costs.
Action commenced before passing of County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 33. Statute of Gloucester, 6 Edw. 1. c. 1. Effect of repeal of 13 & 14 Vict. c. 61. ss. 11. 12., and 15 & 16 Vict. c. 54. s. 4.

IN Hilary Term, Montagu Chambers obtained a rule calling on the defendant to shew cause why the Master should not tax the plaintiff's costs in this action, under stats. 15 & 16 Vict. c. 54. and 30 & 31 Vict.

1868.

Ex parte
BEAL, &c.

1868. c. 142., or under the Statute of *Gloucester*, 6 Ed. 1.
 BUTCHER c. 1.
 V.
 HENDERSON.

The facts were, that the plaintiff commenced an action of trespass before the 20th of *August*, 1867, the day on which The County Courts Act, 1867, 30 & 31 *Vict.* c. 142. received the Royal assent. He recovered at the Summer Assizes at *Croydon* a verdict for less than 5*l.*, but title to land did come in question, so that whilst the law continued to be regulated by stat. 13 & 14 *Vict.* c. 61. ss. 11. 12. and 15 & 16 *Vict.* c. 54. s. 4. the plaintiff was, by stat. 13 & 14 *Vict.* c. 61. s. 11., entitled to a judgment for the amount of the verdict; and no costs, unless the Judge before whom the cause was tried certified for them on the record (which in the present case he did not do), or he obtained an order from a Judge under stat. 15 & 16 *Vict.* c. 54. s. 4., which last order the plaintiff in the present case would have had a right to obtain, as in fact no action could have been brought in the County Court. He did not however obtain such an order before the 1st *January*, 1868, on which day stat. 30 & 31 *Vict.* c. 142. came into operation, and consequently when (by s. 36.) the several enactments specified in Schedule (C.) to that Act were repealed. Amongst those enactments are stats. 13 & 14 *Vict.* c. 61. ss. 11. 12. and 15 & 16 *Vict.* c. 54. s. 4.

The rule was argued *April 27*: before BLACKBURN, MELLOR and LUSH JJ.

Holl, for the defendant.

Montagu Chambers and *Beasley*, for the plaintiff.

The arguments appear fully in the judgment.

Cur. adv. vult.

BLACKBURN J. now delivered the judgment of the Court. (After stating the facts as ante, p. 412.)

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There had been several decisions at Chambers in which Judges had refused to make orders under stats. 13 & 14 *Vict. c. 61. ss. 11. 12.* and 15 & 16 *Vict. c. 54. s. 4.*, or *The City of London Act, 15 & 16 Vict. c. lxxvii. s. 122.*, on the ground that after the repeal of those statutes the Judge had no longer power to make such an order: and this Court, on the authority of *Morgan v. Thorne (a)*, had refused to grant rules to interfere with those decisions; but being informed by Mr. Chambers that the Court of Exchequer had granted a rule in a similar case, *Restall v. The London and South Western Railway Company (b)*, we in deference to their authority did so likewise.

The rule was argued in this Term before my brothers Mellor, and Lush and myself. At the close of the argument we were all of opinion that the rule should be discharged, but proposed to delay our judgment for the purpose of consulting the Court of Exchequer and learning their views on the case pending before them. We afterwards learned for the first time that the Court of Exchequer had given judgment, making absolute the rule in *Restall v. The London and South Western Railway Company (b)*. We took time to consider the effect of that judgment.

The dates in that case were not quite identical with those in the case at bar. There the verdict was obtained in *December, 1867*, but a point was reserved at the trial, so that no application could have been made for an order till after the 1st *January, 1868*. In the case at bar

(a) 7 *M. & W.* 400.

(b) 37 *L. J. Exch.* 89; *L. R.* 3 *Exch.* 141.

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the plaintiff had the whole of *Michaelmas* Term during which he might have obtained an order, and did not. The Court of Exchequer however do not appear to have proceeded on this distinction. They decide generally that a plaintiff in such a case is entitled to an order for costs *ex debito justitiæ*, and if this were a matter which could be brought into a Court of error we should consider ourselves bound by that decision whether we agreed with it or not. But as the case cannot be reviewed in error we are not bound by it. It is an authority to be considered with great respect, and not to be departed from unless we clearly entertain an opinion that it is not right; but that is all. And we have come to the conclusion that we have no power to make such an order as is asked for, and that the plaintiff is not entitled to any costs without it.

Our reasons are as follows. The Statute of *Gloucester*, 6 *Edw.* 1. c. 1., entitled all plaintiffs who recovered damages to a judgment for costs as well as damages. Stat. 13 & 14 *Vict.* c. 61. s. 11. came by way of a proviso (a) on that statute, enacting that if in any action commenced after the 14th *August*, 1850, the plaintiff should recover a sum not exceeding the specified amount, he should have judgment to recover such sum only, and no costs, except in the cases thereafter provided, and that it should not be necessary to enter any suggestion on the record to deprive any such plaintiff of costs. The cases thereafter provided for were those mentioned in sects. 12 and 13. For the latter section stat. 15 & 16 *Vict.* c. 54. s. 4. was substituted. The effect of them is, that on a particular certificate being granted at the trial, or on an order being made by the Court

(a) It is not however so enacted in express terms.

or a Judge, the judgment shall be entered as before the Act.

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The first point made before us was, that as the plaintiff did not in fact sign judgment before these enactments were repealed he was entitled to sign judgment just as if they had never existed. If this argument is correct, all plaintiffs who have at any time during the last eighteen years, in actions commenced after the 14th *August*, 1850, obtained verdicts for trifling sums, and in consequence of not having been able to obtain orders have not hitherto been able to obtain costs, may, if they have not signed judgment for the sum recovered, now sign judgment and recover their costs. This would be most inconvenient, for such cases must be very numerous. But we think no such effect arises from the repeal of the statutes. The maxim alike of law and justice is *Nova constitutio futuris formam imponere debet, non præteritis*. And therefore though when a statute is repealed it is as to new matters as though it had never existed, yet as to transactions already completed under them it still has full effect. See per Lord *Tenterden* in *Surtees v. Ellison* (a), and per *Parke B.* in *Simpson v. Ready* (b), and we think that when, as in the present case, the plaintiff had under the then existing statutes become entitled to a judgment to recover the sum for which he had a verdict and no costs unless he got an order, the transaction was complete, and the repeal of the statutes could not operate to give him a right to a different judgment.

In the case before the Exchequer the plaintiff it appears did not become entitled to sign any judgment till after the 1st *January*, 1868; and, if so, the question

(a) 9 B. & C. 750. 752.

(b) 11 M. & W. 344. 346.

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arose whether the transaction was already completed in that case, and whether a plaintiff who was not in a condition to sign judgment till after the repeal of stat. 13 & 14 *Vict. c. 61. s. 11.* was not entitled to judgment for his costs, though his action were ever so frivolous, and though no order ever would or could have been made to give him costs. It seems to us that stat. 13 & 14 *Vict. c. 61. s. 11.*, enacting a proviso (a) upon the Statute of *Gloucester* taking out of its operation all actions commenced after the 14th *August*, 1850, in which the plaintiff recovers less than a specified amount, is a repeal of that statute so far as it is applicable to such actions; and consequently that, by the operation of Lord *Brougham's* Act, 13 & 14 *Vict. c. 21. s. 5.*, or applying to the construction of stat. 30 & 31 *Vict. c. 142.* the common law rule of construction of which that Act was declaratory, the repeal of stat. 13 & 14 *Vict. c. 61. s. 11.* does not revive the Statute of *Gloucester* as to such actions if commenced before stat. 30 & 31 *Vict. c. 142.* received the Royal assent. The statute by sect. 5. provides for those commenced after that date. On this point the Court of Exchequer expressly refrain from giving any opinion, and it is not necessary for us to decide it.

It was then contended that the Court still had power to make an order for costs under stat. 15 & 16 *Vict. c. 54. s. 4.*, though that enactment, under which, and under which alone, power was given to make such an order, had ceased to exist, and on this point the Court of Exchequer have decided that they have such power. In *Morgan v. Thorne* (b) the plaintiff recovered 1s. damages on the 27th *June*, 1840, and the defendant

(a) See note (a), p. 414.

(b) 7 *M. & W.* 400.

applied to Lord *Abinger*, before whom the case was tried, for a certificate to deprive him of costs, under stat. 43 *El. c. 6. s. 2.*, but he having reserved a point declined to do so till after that was decided. Subsequently, on the 3rd *July* following, stat. 3 & 4 *Vict. c. 24.* came into operation, repealing stat. 43 *El. c. 6.* Then Lord *Abinger* granted the certificate, but the full Court, including Lord *Abinger* himself, determined, p. 402, that “the effect of this statute being entirely to repeal the 43rd *Eliz.*, and to take away every power which the Judges had under it, this certificate is void, and cannot operate to deprive the plaintiff of costs.” The Legislature had not intended this consequence of the repeal of the Statute of *Elizabeth*, and by stat. 4 & 5 *Vict. c. 28.* they altered the enactment of stat. 3 & 4 *Vict. c. 24.*, but the decision of *Morgan v. Thorne* was not reversed. This case is not distinguished by the Court of Exchequer in their judgment in *Restall v. The London and South Western Railway Company (a)*, and it seems to us that the two decisions are not consistent. We must follow one and depart from the other, and the case of *Morgan v. Thorne* being in accordance with our own opinion we follow it.

The rule therefore must be discharged.

Rule discharged (*b*).

(*a*) 37 *L. J. Exch.* 89; *L. R.* 3 *Exch.* 141.

(*b*) See the two following cases.

1868.

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v.
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[1869.]

[Monday,
February 15th,
1869.]

County Court.
30 & 31 Vict.
c. 142.
9 & 10 Vict.
c. 95. s. 128.
Statute of
Gloucester,
6 Edw. 1. c. 1.

LEVY against SANDERSON.

1. The Statute of *Gloucester*, 6 Edw. 1. c. 1., is revived by the repeal in stat. 30 & 31 Vict. c. 142. of the restrictive provisions as to costs in previous County Courts Acts.

2. An action of contract was commenced in this Court before the passing of stat. 30 & 31 Vict. c. 142., under circumstances in which by stat. 9 & 10 Vict. c. 95. s. 128. the Superior Courts had concurrent jurisdiction with the County Court. It was tried after the Act came into operation, and a verdict given for the plaintiff for less than 20*l.*: held that he was entitled to his costs under the Statute of *Gloucester* 6 Edw. 1. c. 1.

3. *Mount v. Taylor*, 37 L. J. C. P. 325; L. R. 3 C. P. 645., upheld by this Court.

THIS was an action on contract commenced before the passing of stat. 30 & 31 Vict. c. 142., which came into operation on the 1st *January*, 1868, and under circumstances in which by stat. 9 & 10 Vict. c. 95. s. 128. the Superior Courts had a concurrent jurisdiction with the County Court. In *July*, 1868, it was tried by the Judge of a County Court in consequence of an order made under sect. 7 of the recent Act, when a verdict was given for the plaintiff for 5*l.* As the plaintiff had recovered less than 20*l.*, and the new limitation respecting costs introduced by stat. 30 & 31 Vict. c. 142. s. 5. did not apply, the Master refused to tax the plaintiff his costs, and *Blackburn J.* on application at Chambers to compel him to do so referred the parties to the Court.

Pinder, having obtained a rule,

In *Michaelmas* Term, 1868, *November* 5th,

Patchett shewed cause, citing *Butcher v. Henderson* (a) as in point.

Pinder, in support of the rule.—The provisions in

(a) *Ante*, p. 411.

former County Courts Acts restricting the recovery of costs by a plaintiff having been repealed by stat. 30 & 31 *Vict. c. 142.*, he is entitled to them under the general provisions of the Statute of *Gloucester*, 6 *Edw. 1. c. 1.*, which is revived by that repeal. *Mount v. Taylor* (a) is an express authority to that effect. *Butcher v. Henderson* leaves the point undetermined: there the verdict was before stat. 30 & 31 *Vict. c. 142*; here it was after. The Statute of *Gloucester* is not impliedly repealed by any of the County Courts Acts. The common law rule of construction was that when an Act repealing another Act is itself expressly repealed the former revives; *The Bishops' Case* (b), *Tattle v. Grimwood* (c), per *Best C. J.* [He also cited *Rex v. Cator* (d).] Lord *Brougham's* Act, 13 & 14 *Vict. c. 21. s. 5.*, enacts that "where any Act repealing in whole or in part any former Act is itself repealed, such last repeal shall not revive the Act or provisions before repealed, unless words be added reviving such Act or provisions." This section, as well as sect. 6, which is in almost the same terms, has no operation where the former Act is only *constructively* repealed.

[1869.]

 LEVY
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The COURT, consisting of *Lush, Hannen* and *Hayes JJ.*, said that this case and *Mirfin v. Attwood* (e) were so closely connected that they would be considered together.

Cur. adv. vult.

The judgment of the Court was now read by

MELLOR J. as follows. This case, like that of *Mirfin v.*

(a) 37 *L. J. C. P.* 325; *L. R.* 3 *C. P.* 645.

(b) 12 *Co.* 7.

(d) 4 *Burr.* 2026.

(c) 3 *Bing.* 493. 496.

(e) See the next case.

[1869.]

 LEVY
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Attwood, was an action for goods sold, commenced before the passing of the last County Courts Act, 30 & 31 *Vict.* c. 142., and it continued pending for some time after that Act came into operation. In *July*, 1868, it was ordered to be tried before a County Court Judge, and a verdict was obtained for 5*l.* only, but it was a case of concurrent jurisdiction under the 128th section of stat. 9 & 10 *Vict.* c. 95., and therefore if the provisions of the former County Courts Acts had remained in force the plaintiff would have been entitled as of right to obtain a rule or order for his costs, (which was not the case in *Mirfin v. Attwood*).

Under these circumstances, the Master having declined to tax the costs, a rule was obtained on behalf of the plaintiff for this purpose, and it was contended for him that as all the restrictive enactments (13 & 14 *Vict.* c. 61. ss. 11. 12., 15 & 16 *Vict.* c. 54. s. 4.) as to costs in the former County Courts Acts were repealed before the trial, and as the case stood unaffected by the new restrictions introduced by the last Act, the plaintiff was entitled to his costs under the Statute of *Gloucester*, 6 *Ed.* 1. c. 1. The cases of *Restall v. The London and South Western Railway Company* (a) and the recent case of *Mount v. Taylor* (b) were relied on as authorities in his favour.

On the defendant's part it was contended that the repeal of the former restrictions of the County Courts Acts as to costs did not revive the Statute of *Gloucester*, and *Butcher v. Henderson* (c) was cited as an authority on his behalf.

It is true that in *Butcher v. Henderson* (c) this Court

(a) *L. R.* 3 *Exch.* 141; 37 *L. J. Exch.* 89.

(b) *L. R.* 3 *C. P.* 645; 37 *L. J. C. P.* 325.

(c) *Ante*, p. 411.

declined to follow the decision of *Restall v. The South Western Railway Company* (a), but it was expressly pointed out in the judgment of the former case that there the plaintiff had become entitled to sign judgment, and that the transaction was therefore complete before the last Act came into operation, while in *Restall v. The London and South Western Railway Company* the plaintiff was not entitled to sign judgment, and the transaction remained incomplete until after that period. And though this point was not relied on by the Court of Exchequer it certainly formed a main ground of the judgment of this Court in *Butcher v. Henderson* (b). The case of *Mount v. Taylor* (c) was a case of exclusive jurisdiction in the superior Court, which the Court there considered to stand on the same footing as a case of concurrent jurisdiction like the present, and there as here the transaction remained incomplete until after the 1st January, 1868. The Court of Common Pleas in that case held that in cases of exclusive or concurrent jurisdiction where the right to costs was substantially preserved by the former County Courts Acts, the Statute of *Gloucester* could not be considered as repealed with regard to such cases, and on this ground and because the transaction was incomplete before the repeal of the former County Courts Acts took effect they held the plaintiff entitled to costs, as the Court of Exchequer had done in *Restall v. The London and South Western Railway Company* (a), though on a different ground.

Looking to these authorities and having regard to the desirableness of uniformity of decision in cases of this

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(a) *L. R. 3 Exch.* 141; 37 *L. J. Exch.* 89.

(b) *Ante*, p. 411.

(c) *L. R. 3 C. P.* 645; 37 *L. J. C. P.* 325.

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nature we are not disposed to dissent from the view taken in the case of *Mount v. Taylor (a)*, and we therefore are of opinion that the plaintiff is entitled to his costs in this case, and that the rule should be made absolute.

Rule absolute.

(a) *L. R. 3 C. P. 645; 37 L. J. Q. B. 325.*

[Wednesday,
May 12th,
1869.]

MIRFIN against ATTWOOD.

Costs.
County Courts
Act, 1867,
30 & 31 Vict.
c. 142.
Statute of
Gloucester,
6 Edw. 1. c. 1.
Effect of repeal
of 13 & 14
Vict. c. 61.
ss. 11, 12., and
15 & 16 Vict.
c. 54. s. 4.

1. Per *Lush* and *Hayes JJ.* In cases where there is neither exclusive nor concurrent jurisdiction in the superior Courts, nor any ground for obtaining a Judge's certificate for costs, the Statute of *Gloucester*, 6 *Edw. 1. c. 1.*, is repealed by the provisions in The County Courts Acts, 9 & 10 *Vict. c. 95. s. 129.*, 13 & 14 *Vict. c. 61. ss. 11. 12.*, 15 & 16 *Vict. c. 54. s. 4.*, which prevented the plaintiff from obtaining his costs in any way; and is not revived as to such cases by The County Courts Act, 1867, 30 & 31 *Vict. c. 142.*, which repealed those provisions as to costs.

2. Per *Hannen J.*, and *semble* per *Cockburn C. J.* The effect of repealing the enactments in the County Courts Acts, which empowered the Court or a Judge to order that the plaintiff should recover his costs, and which imposed a condition on the obtaining them, was to leave the plaintiff in the position in which he was before the existence of the repealed enactments, that is, entitled to recover his costs under the Statute of *Gloucester*.

3. An action for goods sold was commenced before the passing of The County Courts Act, 1867, 30 & 31 *Vict. c. 142.*, and was by order of a Judge tried in the County Court after that Act came into operation, and a verdict obtained for 15*l. 2s.*: there was neither exclusive nor concurrent jurisdiction in the superior Courts, nor any ground for obtaining a Judge's certificate for costs. Held, per *Lush* and *Hayes JJ.*, that the plaintiff was not entitled to costs, per *Hannen J.*, and *semble* per *Cockburn C. J.* that he was.

THIS action was brought to recover 16*l. 15s.* for goods sold and delivered, and was commenced in *July*, 1867. The defendant pleaded on the 8th *August*, and issue was joined on the 28th *March*, 1868. The cause was by order of a Judge tried at the *Marylebone* County Court of *Middlesex* on the 20th *April*, and judgment given for the plaintiff for 15*l. 2s.*

At the time of the commencement of the action the defendant dwelt within the jurisdiction of the County Court of *Bloomsbury*; but the cause of action arose wholly at *Norwood*, in the county of *Surrey*, where he carried on business.

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A summons was taken out to recover the costs, but the Master held that he had no power to make an order, as the provisions in the County Courts Acts which allowed costs in cases of concurrent jurisdiction were repealed by stat. 30 & 31 *Vict. c. 142*. A second summons was taken out on the 20th *May*, before *Willes J.*, who observed that if he were to make an order he should be setting aside the decision of this Court in *Butcher v. Henderson* (a). In consequence however of the subsequent decision of the Common Pleas in *Mount v. Taylor* (b) another summons was taken out before *Willes J.*, who again refused to make an order on the same grounds, and indorsed on the summons:—"No order. I consider myself bound by *Butcher v. Henderson*."

In *Trinity Term*,

Kemplay obtained a rule calling upon the defendant to shew cause why the plaintiff should not be allowed his costs of this action to be taxed by one of the Masters, and why he should not have judgment for the same.

The rule was argued in *Michaelmas Term*, *Nov. 16*, 1868, before COCKBURN C. J., LUSH, HANNEN and HAYES JJ.

Holl shewed cause.—The superior and the County Court have not concurrent jurisdiction, and therefore

(a) *Ante*, p. 411.

(b) 37 *L. J. C. P.* 325; *L. R.* 3 *C. P.* 645.

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under the provisions of the former County Courts Acts the plaintiff would not have been entitled to costs, and the repeal of those provisions by stat. 30 & 31 *Vict. c. 142. s. 33*, Schedule (C.), does not revive the Statute of *Gloucester*, 6 *Edw. 1. c. 1.*, so as to give costs to plaintiffs in actions commenced before the repealing statute came into operation. Lord *Brougham's Act*, 13 & 14 *Vict. c. 21. s. 5.*, enacts that "where any Act repealing in whole or in part any former Act is itself repealed, such last repeal shall not revive the Act or provisions before repealed, unless words be added reviving such Act or provisions." The judgment in *Butcher v. Henderson* (a) points out the inconveniences which would arise from the plaintiff being entitled to sign judgment as if those provisions had never existed. The only distinction between that case and the present is that in that, the verdict having been obtained in *August*, 1867, the plaintiff was in a position to sign judgment before stat. 30 & 31 *Vict. c. 142.* came into operation, and therefore there was an interval in which he might have obtained an order for costs from a Judge under stat. 15 & 16 *Vict. c. 54. s. 4.*; in the present case the verdict was not obtained until after stat. 30 & 31 *Vict. c. 142.* came into operation, and therefore there was no laches in the plaintiff not obtaining an order for costs. But the judgment in *Butcher v. Henderson* (a) does not proceed on that distinction. As was said by *Smith J.* in *Mount v. Taylor* (b), "It seems to me to be clear, therefore, that as to the excepted classes of cases, there never had been a repeal of the Statute of *Gloucester*, but modifications of it only. Then, these modifications being repealed, the Statute of *Gloucester*

(a) *Ante*, p. 411.(b) 37 *L. J. C. P.* 325. 331; *S. C. L. R.* 3 *C. P.* 645.

stands in all its integrity as regards these cases. It is said that the case in the Queen's Bench is opposed to this decision. But it is not really so, for there the right to judgment and to costs accrued before 30 & 31 *Vict. c. 142.* came into operation, as was pointed out by the Court, who held, as the ground of decision, that the plaintiff was bound by the then existing law; whilst here the right to costs did not accrue till that statute was in operation." [*Cockburn C. J. The Statute of Gloucester* still stands in force as to actions to which it is applicable; it is only repealed indirectly by stat. 13 & 14 *Vict. c. 61. s. 11.* as to actions in the County Courts which are taken out of its operation. Therefore this is not the case of a statute swept away and obliterated from the statute book as if it had never passed, according to the observation of *Tindal C. J.* in *Ray v. Goodwin (a)*, cited in *Morgan v. Thorne (b)*.] In *Restall v. The London and South Western Railway Company (c)* the superior and the County Court had concurrent jurisdiction. In *Mount v. Taylor (d)*, title being in question, the County Court had no jurisdiction, and therefore the plaintiff would have been entitled to his costs under the Statute of *Gloucester, 6 Edw. 1. c. 1.*, which, as to such cases, was not repealed by the County Courts Acts.

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Kemplay, contra.—The right to costs must be governed by the law existing at the time the party is entitled to ask for them, and not at the time when the action was brought. Here the verdict and judgment were after

(a) 6 *Bing.* 576. 582-3.(b) 7 *M. & W.* 400, 401-2.(c) 37 *L. J. Exch.* 89; *L. R.* 3 *Exch.* 141.(d) 37 *L. J. C. P.* 325; *L. R.* 3 *C. P.* 645.

[1869.]

 MIRFIN
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the 1st *January*, 1858, when stat. 30 & 31 *Vict. c. 142.* came into operation; and as at that time the plaintiff was entitled to costs under the Statute of *Gloucester*, 6 *Edw. 1. c. 1.* there is nothing to prevent his having them under it.

First. Independently of Lord *Brougham's* Act, 13 & 14 *Vict. c. 21. s. 5.*, there is no foundation for the dictum in *Butcher v. Henderson* (a), nor for the dictum of *Willes J.* in *Mount v. Taylor* (b), that the provisions in the former County Courts Acts depriving the plaintiff of costs are a repeal of the Statute of *Gloucester* as to cases within the fourth class of cases to which he refers, viz. trifling actions, though not as to those within the other three. In *Restall v. The London and South Western Railway Company* (c) there was concurrent jurisdiction, and the action was commenced before, but the plaintiff was not entitled to judgment until after, stat. 30 & 31 *Vict. c. 142.* came into operation. Here the plaintiff does not ask for an order under repealed statutes, but for a direction to the Master to tax his costs under the Statute of *Gloucester*. In *Butcher v. Henderson* the action, though commenced before the passing of stat. 30 & 31 *Vict. c. 142.*, was in that state when the plaintiff was entitled to judgment that he was not entitled to costs unless he got an order for them. The repeal of stats. 13 & 14 *Vict. c. 61. ss. 11. 12.* and 15 & 16 *Vict. c. 54. s. 4.* left the right to costs as it existed before those statutes passed. In *Mount v. Taylor* (d) a verdict was taken subject to a reference, the order

(a) *Ante*, p. 411.

(b) 37 *L. J. C. P.* 325. 330; *L. R. 3 C. P.* 645. 653.

(c) 37 *L. J. Exch.* 89; *L. R. 3 Exch.* 141.

(d) 37 *L. J. C. P.* 325; *L. R. 3 C. P.* 645.

of reference bearing date the 7th *August*, 1867, and the award in favour of the plaintiff was made after stat. 30 & 31 *Vict. c. 142.* came into operation, and it was held that the condition of getting the certificate was wiped away and the Statute of *Gloucester* remained, and therefore the plaintiff was entitled to his costs. In *Oldreeve v. Puckeridge* (a) the award was made before stat. 30 & 31 *Vict. c. 142.* was passed. At the time this action was brought stat. 15 & 16 *Vict. c. 54. s. 4.* was in force, and if it had continued the plaintiff would not have been entitled to costs without a Judge's order or certificate; but, being repealed, he was entitled to judgment for his costs under the Statute of *Gloucester*, which was not repealed in the ordinary sense of that term, but only modified by the provisions in the former County Courts Acts. Even supposing those provisions operated as a quasi repeal of the Statute of *Gloucester*, they have been repealed, and therefore the Statute of *Gloucester* is revived as to all actions in which the plaintiff was entitled to his costs on fulfilling the conditions contained in the repealed provisions of the County Courts Acts. [*Cockburn C. J.* A party who brings his action for the violation of a right is by law entitled to two things, damages and costs: the right to the latter is independent of procedure (b).] [He cited *Charrington v. Meatheringingham* (c), *Morgan v. Thorne* (d), *Reg. v. The Inhabitants of Mawgan* (e), *Warne v. Beresford* (f), *Roadknight v. Green* (g), *Wright v. Hale* (h).]

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(a) 37 *L. J. Exch.* 90; *L. R. 3 Exch.* 145, note.(b) However, as to this, see *Wright v. Hale*, 6 *H. & N.* 227, and *Kimbray v. Draper*, 9 *B. & S.* 80.(c) 2 *M. & W.* 228.(d) 7 *M. & W.* 400.(e) 8 *A. & E.* 496.(f) 6 *Dowl.* 157.(g) 9 *M. & W.* 652.(h) 6 *H. & N.* 227.

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Secondly. Stat. 13 & 14 *Vict. c. 21. s. 5.* does not affect the present case. It would be absurd that the repeal of a section which imposed modifications and conditions on the statute of *Gloucester* should leave that statute for ever repealed. The manifest intention of repealing the repealing sections was to revive the former statute. Sect. 5 concludes thus, "Unless words be added reviving such Act or provisions," which clause is rather stronger than that in sect. 4, on which the question has been raised whether under the word "person" women are entitled to the parliamentary franchise. The difficulty intended to be provided for was where a statute contained various provisions and a clause repealing a former statute in whole or in part; and if in subsequent legislation that statute was repealed it might be forgotten or overlooked that it had such a clause.

Cur. adv. vult.

The Judges not being agreed the following judgments were now delivered (*a*).

HAYES J. In this case, which was argued in last *Michaelmas* Term, a rule had been obtained calling on the defendant to shew cause why the plaintiff's costs should not be taxed by the Master, and the question related to the operation of The County Courts Act, 1867, 30 & 31 *Vict. c. 142.*, on the costs of actions in the superior Courts.

(*a*) The reporters are authorised to state that COCKBURN C. J. would have agreed with HANNEN J., but by an oversight the above judgments were delivered in the absence of the Lord Chief Justice. The case was not reargued as the Court, if composed of the same Judges, being equally divided, the rule would have dropped, and so the result would have been the same.

The action, which was for goods sold, had been commenced *before* the passing of that Act. It was by order of a Judge tried before the County Court of *Marylebone*, and came on for trial *after* the Act had come into full operation, when the plaintiff obtained a verdict for 15*l.* 2*s.* It was not a case of either exclusive or concurrent jurisdiction in the superior Courts, nor was it suggested that any ground had existed for obtaining the order of a Judge, under the repealed County Courts Act, 15 & 16 *Vict. c. 54 s. 4.*, that there was sufficient reason for bringing such action in the superior Court. It was therefore a case in which the plaintiff would have been wholly deprived of his costs if the restrictive enactments on this subject in the previous County Courts Acts, 9 & 10 *Vict. c. 95. s. 129.*, 13 & 14 *Vict. c. 61. ss. 11. 12.*, 15 & 16 *Vict. c. 54. s. 4.*, had remained in force. But it was contended for the plaintiff, that, as these enactments had all been repealed while the action was still pending, upon The County Courts Act, 1867, coming into operation, and as the new provision contained in sect. 5 of the last Act did not apply to actions commenced before the passing of that Act, the effect was to revive the Statute of *Gloucester*, 6 *Edw. 1. c. 1.*, as to actions like the present, and to entitle the plaintiff to his costs under that statute.

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This point was raised but not decided in the Court of Exchequer in *Restall v. The London and South Western Railway* (a) and *Oldreeve v. Puckeridge* (b). The first of these cases was one of concurrent jurisdiction in the superior Court, and the second resembled the present case; but in both of them the event on which the costs depended

(a) 37 *L. J. Exch.* 89; *L. R. 3 Exch.* 141.

(b) 37 *L. J. Exch.* 90; *L. R. 3 Exch.* 145, note.

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had occurred before the recent Act came into operation, and upon this ground the Court held that the right was concluded by the former Acts which were then unrepealed, and which entitled the plaintiff to his costs in the first case, and deprived him of them in the second. The point was again raised in *Butcher v. Henderson* (a), which was a case of exclusive jurisdiction in the superior Court; but that case also was determined on the ground that, the transaction having been complete before the new Act came into operation, it was governed by the enactments of the former County Courts Acts. The Court however in delivering judgment on the above ground referred to actions like the present, where the transaction remained incomplete when the repeal came into operation, and expressed an opinion against the right of the plaintiff to costs under a supposed revival of the Statute of *Gloucester* in trivial cases where no order ever would have been made to give him costs before.

In *Mount v. Taylor* (b) this question was again raised, and very fully discussed in a case where the event determining the costs did not occur until after the recent County Courts Act had come into full operation, and therefore the transaction remained incomplete when the repeal of the provisions of the former Acts took effect. That case therefore resembles the present, except that there the cause of action involved questions of title which gave the plaintiff a right to costs under the former Acts. And the Court decided that the Statute of *Gloucester* had not been repealed as to the classes of cases in which under the former County Court Acts the plaintiff would be entitled to costs on obtaining a

(a) *Ante*, p. 411.

(b) 37 *L. J. C. P.* 325; *L. R.* 3 *C. P.* 645.

Judge's order or certificate, either on the ground of exclusive or concurrent jurisdiction, or where the circumstances of the case shewed a sufficient reason for bringing the action in the superior Court. But with regard to cases like the present, where there was neither exclusive nor concurrent jurisdiction, nor any ground for obtaining a Judge's order or certificate, an opinion was expressed by *Willes J. (a)*, and not dissented from by the rest of the Court, that as to such cases the Statute of *Gloucester* had been repealed by the former County Courts Acts, which prevented the plaintiff from obtaining his costs in any way; and that under the provisions of the Act commonly called Lord *Brougham's* Act, 13 & 14 *Vict. c. 21. s. 5.*, the Statute of *Gloucester* was not revived by The County Courts Act, 1867, but continued repealed as to such cases. In this opinion, which was substantially the same as that which was expressed by *Blackburn J.* in delivering the judgment of this Court in *Butcher v. Henderson (b)*, my brother *Lush* and I concur, and we think that the present rule should be discharged.

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HANNEN J. I regret that I cannot concur in the judgment of my learned brothers. The cases are so few in which the point here to be determined can arise that I should not have thought it necessary to make any observations but for the bearing which the decision of my brothers may have on the question, when a statute can be considered to be repealed by implication, and the effect in such a case of a repeal of the repealing statute.

In this case the action was commenced in *July*, 1867,

(a) 37 *L. J. C. P.* 325. 330; *L. R.* 3 *C. P.* 645. 653.

(b) *Ante*, p. 411.

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before the passing of the recent County Courts Act. It was tried in *April*, 1868, *after* the County Courts Act came into operation.

If no change had been made in the law relating to costs between the commencement of the action and the trial, the plaintiff would have been entitled to apply to a Judge at Chambers under stat. 15 & 16 *Vict. c. 54. s. 4.* to direct that the plaintiff should recover his costs if he could make it appear to such Judge that there was sufficient reason for bringing the action in the Court in which it was brought. But by the recent County Courts Act the section above referred to was repealed, and it therefore became impossible for the plaintiff to obtain the order of a Judge under it.

It was indeed decided by the Court of Exchequer in *Restall v. The London and South Western Railway Company (a)*, where the verdict was obtained before the recent County Courts Act came into operation, that the power of a Judge to make an order under that section still continued notwithstanding its repeal. It was however held by this Court in *Butcher v. Henderson (b)* that, after the repeal of the enactment, the power to make an order under it was absolutely put an end to, even though it would have been made *ex debito justitiæ*, if the law had remained unaltered.

But the Legislature, at the same time that it repealed the power of a Judge to order that the plaintiff should recover his costs, also repealed stat. 13 & 14 *Vict. c. 61. s. 11.*, by which the necessity for such an order was created. The language of stat. 13 & 14 *Vict. c. 61. s. 11.* is as follows:—“If in any action commenced after the

(a) 37 *L. J. Exch.* 89; *L. R. 3 Exch.* 141.

(b) *Ante*, p. 411.

passing of this Act in any of Her Majesty's Courts of record in covenant, debt, &c., the plaintiff shall recover a sum not exceeding 20%, . . . , the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided;" and one of those excepted cases was where an order of the Court or of a Judge at Chambers was obtained under sect. 13 of that Act, for which was afterwards substituted sect. 4 of stat. 15 & 16 *Vict. c. 54*. I think that the effect of thus repealing with one breath the enactment which empowered the Court or a Judge to order that the plaintiff should recover his costs and that which imposed this as a condition on the obtaining his costs is to leave the plaintiff in the position in which he would have been before the existence of the repealed statutes, that is, entitled to recover his costs under the Statute of *Gloucester*.

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It was contended for the defendant that the decision in *Bratcher v. Henderson* (a) was opposed to this view, but I think that is not so. In that case the plaintiff in an action of trespass recovered a verdict for less than 5% before the recent County Courts Act was in force; he was therefore entitled to a judgment for the amount of the verdict and no costs unless he obtained an order of a Judge under stat. 15 & 16 *Vict. c. 54. s. 4*, which he had an opportunity of doing but did not do before that enactment was repealed. This Court, applying the maxim "Nova constitutio futuris formam imponere debet, non præteritis," held that the transaction was complete when the plaintiff recovered his verdict, and that, as at that time he was entitled to recover judgment for less than 5% and no costs unless he got an order, which he failed

(a) *Ante*, p. 411.

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to do, the repeal of the statute could not operate to give him a right to a different judgment. This Court expressly rested its judgment on the fact that the event on which the plaintiff's right to costs depended, namely, recovery by verdict, occurred before stat. 30 & 31 Vict. c. 142. came into operation. And this has been pointed out to be the ratio decidendi of the case by *Smith J.* in *Mount v. Taylor (a)*. But in the present case, when the plaintiff recovered his verdict, there was no statute in existence which deprived him of costs unless he obtained the order of a Judge: he is therefore entitled to have his costs under the general enactment of the Statute of *Gloucester* that the plaintiff in all actions in which he recovers damages shall also recover against the defendant his costs of suit.

It was however contended for the defendant that the Statute of *Gloucester* was repealed by the County Courts Acts as to all actions of debt in which the plaintiff recovers less than 20*l.*, and that the subsequent repeal of those statutes did not revive the Statute of *Gloucester* by reason of the 5th section of Lord *Brougham's* Act, 13 & 14 Vict. c. 21. This point was under the consideration of the Court of Common Pleas in *Mount v. Taylor (a)*, and, for the reasons which are so fully given in the judgments in that case, I think that the Statute of *Gloucester* was not repealed by the County Courts Acts, but that conditions only were imposed on its operation, such as the obtaining the Judge's order; and that where the conditions were fulfilled the right to costs was derived from the Statute of *Gloucester*. *Willes J.* says, *L. R. 3 C. P.* 653, "If the records of the Court be searched from the passing of the County Court Acts to the present

(a) 37 *L. J. C. P.* 331; *L. R. 3 C. P.* 645.

day, it will be found that the costs have always been taxed upon the Statute of *Gloucester*, and not upon the order of the Judge, that order being treated only as evidence of the right. The records therefore . . . lead to the inevitable conclusion that the Statute of *Gloucester* was in force as to all cases in which a Judge's order could be obtained under the County Court Acts, and that it was the Statute of *Gloucester* in such cases which gave the plaintiff his costs while the County Court Acts rendered the obtaining a Judge's order a necessary condition, and it is the statutes imposing this condition only which have been repealed by the Act of last year." It is true that in *Mount v. Taylor* (a) the action could not have been brought in the County Court, but the reasoning of the learned Judges is equally applicable to a case like the present where the County Court had jurisdiction. I would refer particularly to the judgment of *Smith J.*, which appears to me conclusively to establish that the Statute of *Gloucester* cannot properly be said to be repealed as to those cases in which a Judge had power to certify that the plaintiff recover his costs. To impose a condition on a class of plaintiffs before they shall be entitled to the benefit of a statute is not a repeal of it as to them, and it is only by a figure of speech that it has been so described; it merely intercepts in the specified cases the operation of the statute, which remains in existence and unrepealed notwithstanding. The 5th section of Lord *Brougham's* Act, 13 & 14 *Vict. c. 21.*, has for its object to prevent the revival of a statute contrary to the intention of the Legislature; but it cannot be supposed that it is contrary to the intention of the Legislature to restore to a statute its original force without condition

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when all that it has done has been to repeal the condition, and it can make no difference that other qualifications are introduced which are not applicable to all the cases to which the repealed condition attached. It appears to me that the few cases in which the circumstances can be similar to the present were not in the contemplation of the Legislature when it enacted the recent County Courts Act, and I think it better to say so than to put a construction on the statute which may create an embarrassing precedent on other occasions.

I think therefore that our judgment should be for the plaintiff.

Rule discharged (a).

(a) See the two preceding cases.

Friday,
 May 1st.

GREENSLADE *against* DARBY.

*Perpetual
 curate.
 Lay rector.
 1 G. 1. st. 2.
 c. 10.
 Right of
 depasturing
 sheep in
 churchyard.*

The perpetual curate of a benefice has a right to the possession of the church and churchyard so far as is necessary for the performance of his sacred functions, but no farther, and therefore has no right to prevent the lay rector or persons claiming under him from depasturing by sheep the grass in the churchyard: and the law in this respect is not affected by stat. 1 G. 1. st. 2. c. 10.

THE plaintiff was the perpetual curate and incumbent of *Stoke sub Hamden*, in the county of *Somerset*. The church stands in an enclosed churchyard into which the public have access by a gate leading from the high road.

The defendant was the tenant and occupier of certain glebe land adjoining the churchyard and communicating with it by another gate, and the action was brought against him for having turned his sheep into the

churchyard and depastured the grass there against the will of the plaintiff.

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The following special case was stated for the opinion of the Court.

The rectory of *Stoke sub Hamden, Somersetshire*, is an impropriate rectory, and after its surrender to the Crown upon the dissolution of the monasteries was granted by Queen *Elizabeth* to *John Robinson* and *Lawrence Singleton* as joint tenants in fee, from whom the family in whom the rectory is vested derive their title. The rectory is valued in the King's books at 49*l.* 19*s.* 8½*d.*, and its endowment is there stated to arise from glebe and tithes.

Sarah Frances Hawkesworth, wife of *Thomas Hawkesworth*, Esquire, is lay rector and impropriator of the church. The tithes of the parish are commuted at 447*l.* 10*s.* There is a considerable extent of glebe land with a house upon it, which are in the occupation of the defendant.

Prior to the year 1826 the owner for the time being of the impropriate rectory provided a curate to serve the church at *Stoke* at an annual stipend of 31*l.* 10*s.*, which, down to the last mentioned year, was not a charge on the rectory or tithes.

On the 17th *February*, 1826, *Andrew Bain*, the father of *Sarah Frances Hawkesworth*, as the then patron of the church, signed a consent to the augmentation of the living by the Governors of Queen *Anne's* Bounty, who accordingly in that year augmented the living with 1600*l.* out of the Parliamentary Grants Fund (now represented by 1846*l.* 13*s.* 6*d.* Consols); and in consideration of such augmentation *Andrew Bain*, by deed dated the 4th *July*, 1826, and made between him of the first part, the

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Governors of Queen *Anne's* Bounty of the second part, and the Reverend *Richard Phelps*, therein described as curate of the curacy of *Stoke under Hamden* aforesaid, of the third part, charged the impropriate rectory of *Stoke under Hamden*, and the glebe lands, tithes, tenths, fruits, profits, oblations, obventions, emoluments, commodities, advantages and appurtenances whatsoever thereunto belonging or appertaining, with the yearly rentcharge of 3*l.* 10*s.*, payable quarterly to the said *Richard Phelps* and his successors curates of the curacy of *Stoke under Hamden*. A copy of this deed was annexed to and formed part of the case. On the augmentation the curacy became a perpetual benefice under stat. 1 *G.* 1. *st.* 2. *c.* 10.

In 1842 a further augmentation was made out of the Royal Bounty Fund of - - - £200 0 0

To meet benefactions amounting to - 350 0 0

Total £550 0 0

The tithes both great and small were enjoyed by *Thomas Hawkesworth* in right of his wife, and the rentcharge of 3*l.* 10*s.* was paid to the plaintiff by equal quarterly payments.

The plaintiff was nominated to the incumbency in 1852, and duly subscribed the Articles and took the oaths as required by such license, and was duly instituted, and read himself in incumbent and to perform the duties of the church. The plaintiff and his predecessors have always received for his and their own use and benefit, without payment to any other person, the fees for brick graves and head stones from time to time opened or put up in the churchyard.

From the time of the grant by Queen *Elizabeth* the

lay impropriators of the church have had the exclusive possession of all the tithes of the parish and the glebe. The glebe lands have, from time to time during living memory, been let out to tenants by the lay impropriators, who have also upon such occasions let to such tenants the depasturing of the churchyard with sheep, and the tenants under such demises have turned their sheep into the churchyard to graze from time to time during every year until the commencement of this action without interruption except as hereinafter mentioned. The defendant became tenant of the glebe lands under such a letting about eighteen years ago. In the wall which divides the glebe lands from the churchyard on one side there is a gateway, by which the tenant had access to the churchyard ; there is a gate in the gateway which was put up and always repaired by the lay impropriator, and the public have no right to use the gate or gateway which leads only to the glebe fields.

In the year 1865 the plaintiff objected to the defendant turning his sheep into the churchyard, and he claimed the legal right of possession of the churchyard as perpetual curate, and a correspondence took place between him and Mr. *Hawkesworth* on the subject.

On the 23rd *January*, 1866, the plaintiff sent the following letter to the defendant.

East Stoke,

Dear Sir,

January 23rd, 1866.

I hereby forbid you on pain of trespass to put your sheep or any other cattle into the churchyard of this parish, the right to the use of which is by law vested in the minister for the time being, and I must also request that you will keep the small gate at the south-west

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corner of it leading into Mr. *Hawkesworth's* field in your occupation properly closed.

I give you notice likewise that, by any wilful disregard of the above prohibition, you will subject yourself to an action for trespass.

I am, dear Sir,
 Yours faithfully,
W. Greenslade.

The defendant as such tenant continued to turn his sheep into the churchyard after the receipt of this notice, whereupon the present action was brought.

The Court were to be at liberty to draw the same inferences of fact that a jury might draw.

The question for the opinion of the Court was, whether the present action was maintainable.

Manisty (*Watkin Williams* with him), for the plaintiff.
 —Although the freehold of the church and churchyard is in the parson or rector, *Degge's Parson's Councillor*, 162, the incumbent of a perpetual curacy is entitled to the possession of them ; *Cripps' Law of the Church and Clergy*, 5th ed., p. 163, *Mason v. Lambert* (a), *Griffin v. Dighton* (b); and as such has a right to keep out all trespassers. By stat. 1 G. 1. st. 2. c. 10. s. 4. all churches, curacies, or chapels augmented by the Governors of Queen *Anne's* Bounty are declared to be perpetual cures and benefices, and the ministers thereof and their successors shall be esteemed in law bodies politick and corporate, with perpetual succession &c., and enabled to take lands granted to them : and this is further carried out by stats. 36 G. 3. c. 83.,

(a) 12 Q. B. 795.

(b) 5 B. & S. 93.

8 & 9 *Vict. c. 70. s. 17.* In this respect the perpetual curate stands in the position of the old vicar after endowment, as required by stats. 15 *Ric. 2. c. 6.*, 4 *H. 4. c. 12.* In *Cripps' Law of the Church and Clergy*, p. 502, 5th ed., it is said, "The freehold of the churchyard is, to a qualified extent, in the minister * * * The soil and profits belong to him, and he might make a lease thereof; which profits appear to be the feed, and trees growing in the churchyard, or, in fact, any crop which it may bear;" [*Blackburn J.* Perpetual curates are in many respects like vicars, but there is a difference between them (a). *Cockburn C. J.* "Minister" is the term used by Mr. *Cripps*.] That cannot possibly apply to a lay rector. [*Blackburn J.* In *Rogers' Eccl. Law*, 237, it is said, "If in the same church there be both rector and vicar, it may be doubted to which of them the trees or grass of the churchyard belong. But it seems they shall belong to the rector, unless in the endowment of the vicarage it shall be otherwise assigned." The right of the rector to cut down trees in the churchyard is limited by stat. 35 *Ed. 1. st. 2.* to repairs of the church; *Cripps*, p. 503. The interference of the laity with those trees is denounced by a Provincial Council; 1 *Burn's Eccl. Law*, 347, 9th ed., *Lyndw. Provinc.* 267, ed. 1679. A perpetual curate endowed under stat. 1 *G. 1. st. 2. c. 10.* cannot be removed without cause; 2 *Burn's Eccl. Law*, 55 a, 9th ed., and he has the same interest in his curacy as if he had been presented, instituted and inducted; *Cripps*, 163, 5th ed.

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Pinder, contra.—The finding in the special case that during living memory the lay impropriators of this

(a) See now stat. 31 & 32 *Vict. c. 117.*

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benefice and their tenants have enjoyed the right of depasturing the churchyard with sheep is evidence from which a jury would presume a user ever since the time of legal memory. In *Strachy v. Francis* (a) Lord *Hardwicke* says, "A rector may cut down timber for the repairs of the parsonage house or the chancel, but not for any common purpose; and this he may be justified in doing under the statute of 35 *Ed. 1. stat. 2.*, intituled *Ne rector prosternat arbores in cœmeterio*. If it is the custom of the country he may cut down under-wood for any purpose, but if he grubs it up, it is waste." The state of the vicar is not to be confounded with that of the perpetual curate. The former must be endowed, the latter is not necessarily so. This question is not affected by stat. 1 *G. 1. st. 2. c. 10.*, per *Coleridge J.*, in *Doe d. Richardson v. Thomas* (b). The rector having a right to take the trees in the churchyard is inconsistent with the perpetual curate having exclusive possession of it. *Jones v. Ellis* (c) and *Griffin v. Dighton* (d) shew that the possession of the church and churchyard by the perpetual curate is only for sacred purposes; in the same manner as a churchwarden has possession of them for the benefit of the parish. A perpetual curate endowed under stat. 1 *G. 1. st. 2. c. 10. s. 4.* is only removable by the ordinary, whereas the ancient vicar was removable by the incumbent. 2 *Burn's E. L.* 55 a, 9th ed.; *Gibbs. Cod.* 819, 2nd ed. [*Blackburn J.* That shews a distinction between them.]

Manisty, in reply.—*Jones v. Ellis* (c), *Griffin v. Dighton* (d), prove that the perpetual curate has pos-

(a) 2 *Atk.* 217.

(c) 2 *Y. & J.* 265.

(b) 9 *A. & E.* 556, 575.

(d) 5 *B. & S.* 93.

session of the church and churchyard. *Strachy v. Francis* (a) was the case of a *spiritual* rector.

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COCKBURN C. J. Our judgment must be for the defendant. The statute 1 *G.* 1. *st.* 2. *c.* 10. has nothing to do with the matter before us. All that statute did was, that it enables the Governors of Queen *Anne's* Bounty to endow perpetual curacies, provides a more solemn form of induction, makes them corporations, and enables them to accept any further endowment from the governors or others. The endowment of the perpetual curacy in the case before us consists of a sum of money granted by the Governors of Queen *Anne's* Bounty and an annual charge on the rectory, but there was no endowment of the glebe or churchyard. Mr. *Manisty* says that as perpetual curate the plaintiff is entitled to the possession of the church and churchyard and to keep out everybody except the churchwardens and persons coming to discharge their office. That however assumes the whole matter in dispute, namely, that the plaintiff being incumbent of the churchyard has such possession of it that the rights of others, including the owners of the freehold, are excluded. I quite agree that, both on general principle and decided cases, the incumbent has possession of the church and churchyard, but that is only for the special purpose of doing what is necessary for the duties of his office, and I do not see how that excludes the rector from exercising his concurrent rights. It is clear there are cases in which the lay rector may have the trees in the churchyard, and it is laid down in *Lyndwood Provinc.* lib. 3, tit. 28, p. 267, ed. 1679, that where in a parish

(a) 2 *Atk.* 217.

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there is a rector and also a vicar, the vicar is not entitled to the trees except in virtue of his endowment of the vicarage. Generally speaking the endowment carries with it the ordinary rights of property. Yet as is the case with trees, so there may be a case where the right of pasture or right of herbage arising out of the soil does not belong to the vicar. If the trees may be in a layman so may the grass. But the case of a perpetual curate is different, as this case shews. As there are cases in which the right to the trees does not go to the vicar, so here the possession of perpetual curate does not carry anything not necessary to his office, unless it is part of the endowment, which is not the case here. Not only is mere possession of the perpetual curacy not enough to support the plaintiff's claim, but it has been the custom in this case, as far back as living memory will go, for the rector and those claiming under him to use this land as was done here, and this having been allowed for so long may be taken to have had a lawful origin.

BLACKBURN J. I am of the same opinion. Look how matters stood originally: the land belonged to some person, but so far as any portion of it was consecrated his right or interest in it was much cut down. In all cases some profit would be incidentally made out of the churchyard, and this would belong to the rector as owner of the fee simple. The religious houses, when they got possession of a rectory, sent one of their own body to perform the religious services. This person had no particular interest in the land, but was called the vicar. Then came the statutes 15 R. 2. c. 6., 4 H. 4. c. 12., saying the vicar should be perpetual and have an endowment, and, as he had so far got possession of

the land on which the church stood, he might be considered possessor generally. The practice was usually to give him the small tithes and a small part of the glebe. Vicars for several centuries have been in enjoyment of the pasturage of the churchyard, and the presumption is that they were endowed of them ; but this was not necessarily the case, as it might be shewn that the rector reserved it to himself. Then came the perpetual curate. Here there was no endowment and no possession further than for the purpose of performing the duties of or acting as a spiritual rector. After the Reformation, when the benefice came into the hands of a lay impropriator, he was bound to appoint a person to perform those duties ; but there is nothing in that which would give the perpetual curate possession of the church and churchyard. Does then the fact of his having got possession of the land, even for temporal purposes, make any alteration ? I think not. If indeed the Legislature had directed that this consequence should follow from endowment under Queen *Anne's* Bounty, we must so hold, but that would be a strong enactment, and I doubt if the Legislature would have agreed to it. Looking however at stat. 1 *G. 1. st. 2. c. 10.*, it contains nothing of the kind. That statute only makes the perpetual curate a body corporate, provides for more solemn induction and enables him to accept further endowments, all very proper and just conditions. But there is nothing to say that the property in the land is to be taken from the lay impropriator. Mr. *Manisty* contends that by operation of law induction must put the perpetual curate in possession of the church and churchyard. But all that he is put in possession of is

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1868. for the purpose of his sacred office, and not for all purposes.

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HANNEN J. I am of the same opinion. Stat. 1 G. 1. st. 2. c. 10. does not affect this case. As to the general question, we are empowered to draw inferences of fact, and as we have proof here that so far as living memory goes back the rector has enjoyed this land, it is necessary to shew that this could not have a legal origin. But no authority has been cited for that proposition. It has been assumed that the perpetual curate has a right to the possession of the church and churchyard. If possession means exclusive possession there is an end of the question. But I do not see why the rights which he has in the land for the purpose of performing divine service should exclude the rector any more than they would exclude the right of any person having a right of way across the churchyard.

Judgment for the defendant.

END OF EASTER TERM.

EASTER VACATION, 31 VICT.

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The QUEEN *against* The Guardians of the
MEDWAY Union.

*Saturday,
May 9th.*

Stat. 24 & 25 *Vict. c. 55. s. 7.* does not take away the right which overseers of parishes have under stat. 16 & 17 *Vict. c. 97. s. 108.* to appeal against an order adjudging the settlement of a pauper lunatic.

*Lunatic
Asylums Act,
1853, 16 & 17
Vict. c. 97.
s. 108.
24 & 25 Vict.
c. 55. s. 7.*

ON appeal to the Quarter Sessions of the county of
Kent by the churchwardens and overseers of the
parish of *Aldershot* against an order of two justices
adjudicating the settlement of *H. Wilson*, a pauper
lunatic, and ordering certain expenses of his main-
tenance to be paid, the order was quashed subject to
a case.

*Pauper
lunatic.
Settlement.
Appeal.*

The order appealed against was directed to the guar-
dians of the *Medway* Poor Law Union, who were the
respondents, and the guardians of the *Farnham* Poor
Law Union, whereby the justices adjudged the last
legal settlement of *H. Wilson*, then confined in the
lunatic asylum at *Barming Heath*, in that county, to be
in the parish of *Aldershot*, in the *Farnham* Poor Law
Union, and ordered the guardians of the poor of that
union to pay to the respondents certain sums which
had been expended by them, and also weekly and

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every week from the date of the order to pay to the treasurer of the Asylum a certain further sum.

A copy or duplicate of the order, together with the statements required by stat. 16 & 17 *Vict. c. 97. s. 107.*, setting forth the grounds of adjudication including the particulars of the settlement relied on in support thereof, and addressed to the guardians of the poor of the *Farnham* Poor Law Union, and to the churchwardens and overseers of the parish of *Aldershot*, was sent by the respondents to the guardians and the churchwardens and overseers respectively.

Upon the appeal coming on to be heard, it was objected on the part of the respondents that the appeal ought to have been brought by the guardians of the *Farnham* Poor Law Union, and not by the churchwardens and overseers of the parish of *Aldershot*, and it was contended that the churchwardens and overseers had no right to appeal against the order, inasmuch as they were not parties to the order or proceedings before the justices, and the expenses of maintaining the lunatic were under stat. 24 & 25 *Vict. c. 55. ss. 6 and 7.* thrown upon the common fund of the *Farnham* Poor Law Union. The Quarter Sessions overruled the objection, heard the appeal upon the merits and quashed the order.

The question for the decision of the Court was, whether the churchwardens and overseers of the parish of *Aldershot* had a right to appeal against the order.

Stat. 24 & 25 *Vict. c. 55. s. 6.* "The cost of the examination of any lunatic pauper, present or future, of his removal to and from, and his maintenance in any asylum, licensed house, or registered hospital, who

would under any provision of" stat. 16 & 17 *Vict. c. 97.*, "be chargeable to a parish in a union, shall from and after the 25th day of *March* next be borne by the common fund of the union comprising such parish."

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Sect. 7. "The guardians of any union may obtain orders upon the guardians of any other union, or upon the guardians or overseers of any parish not comprised in a union, or upon the treasurer of the county, and may appeal against or defend any orders in respect of any lunatic paupers hereby made chargeable upon the common fund of the union, in like manner and subject to the same incidents and provisions as are contained in the said last cited Act, in respect of lunatic paupers chargeable to any parish in such union: Provided that every appeal now pending may be continued and determined as though this Act had not been passed."

Barrow, for the appellants.—Under The Lunatic Asylums Act, 1853, 16 & 17 *Vict. c. 97. s. 107.*, either the guardians of the union or the overseers of the parish might appeal; *Reg. v. The Justices of the West Riding of Yorkshire (a)*. By stat. 24 & 25 *Vict. c. 55. s. 6.* the costs of the maintenance of a lunatic pauper are now borne by the common fund of the union; but that makes no difference in the right of appeal. The overseers of the parish are more interested in the settlement of the pauper lunatic than the guardians of the union. The order unappealed against will be conclusive on the former as to his settlement; *Reg. v. The Inhabitants of St. Mary, Lambeth (b)*. Before The Union Chargeability Act, 1865, 28 & 29 *Vict. c. 79. s. 2.*, though the pauper lunatic was chargeable to the union his family were

(a) 7 *E. & B.* 14.(b) 7 *Q. B.* 587.

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chargeable to the parish. [*Lush J.* Now the parish in which the pauper lunatic is settled has an interest in the order in common with the other parishes in the union.] Sect. 7 of stat. 24 & 25 *Vict. c. 55.*, which enables the guardians of a union to appeal in the case of lunatic paupers, does not by implication repeal the right of appeal given by stat. 16 & 17 *Vict. c. 97. s. 108.*; and this provision seems needed where a parish is a union by itself. [He also referred to sect. 12 of stat. 24 & 25 *Vict. c. 55.*] “It is a general rule, that subsequent statutes, which add accumulative penalties, and institute new methods of proceeding, do not repeal former penalties and methods of proceeding ordained by preceding statutes, without negative words. Nor hath a latter Act of Parliament ever been construed to repeal a prior Act, unless there be a contrariety or repugnancy in them, or, at least, some notice taken of the former Act, so as to indicate an intention in the lawgiver to repeal it;” *Dwarris on Statutes*, 532-3, 2nd ed. Suppose the guardians of the parish assert at the board of guardians that the pauper lunatic is not settled in their parish, they may be outvoted by the other guardians. [*Jephson*, with him, was stopped.]

Prentice and *Biron*, for the respondents.—This order is obtained under stat. 24 & 25 *Vict. c. 35. s. 7.*, and is addressed not to the overseers of *Aldershot*, but to the guardians of the *Farnham* Union; and an appeal against it is given to guardians “in like manner” as the overseers had an appeal under stat. 16 & 17 *Vict. c. 97.* in respect of lunatic paupers chargeable to a parish. The proviso to sect. 7 of the later Act also shews that an alteration in the law respecting the right of appeal was

intended; therefore that section by implication repeals sect. 108 of stat. 15 & 16 *Vict. c. 97.* [*Lush J.* This is an order under stat. 16 & 17 *Vict. c. 97.*, not under stat. 24 & 25 *Vict. c. 55.*; the form of the order is not different from what it was: sect. 6 of the latter statute only alters its effect.] The overseers of *Aldershot* not being parties to the order, it is not conclusive on them that the pauper lunatic was settled in their parish.

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LUSH J. The Quarter Sessions were right in deciding that the overseers of *Aldershot* had a right of appeal. According to *Reg. v. The Justices of the West Riding of Yorkshire (a)*, under stat. 16 & 17 *Vict. c. 97. s. 108.*, either the guardians of the union or the overseers of the parish or both might have appealed against this order. Then is there anything in stat. 24 & 25 *Vict. c. 55.* to take away from the overseers the right of appeal? The difference is that under stat. 16 & 17 *Vict. c. 97.* the guardians of the union upon whom the order was made charged the expenses against the parish in which the pauper lunatic had been adjudged to be settled: and the effect of the order is altered by stat. 24 & 25 *Vict. c. 55. s. 6.*, which enacts that the cost of maintenance shall be borne by the common fund of the union. But the order must still adjudge the settlement in the parish under stat. 16 & 17 *Vict. c. 97.*, and the parish has some interest in appealing against it, for the maintenance of the lunatic's family would be chargeable to it. It is argued that sect. 7 of the later statute impliedly repeals sect. 108 of the former, but the two may well stand together, though I do not see the reason for the clause in sect. 7 which enacts that the guardians

(a) 7 *E. & B.* 14.

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may appeal. The framers of it overlooked the case of *Reg. v. The Justices of the West Riding of Yorkshire* (a) and assumed that under the former Act the guardians had not the right of appeal.

HANNEN J. concurred.

Judgment for the respondents.

(a) 7 E. & B. 14.

IN THE EXCHEQUER CHAMBER.

Saturday,
May 9th.

BRYANT *against* FOOT.

*Immemorial
payment.
Presumption.
Modus deci-
mandi.
Rankness.
Marriage fee.*

1. A marriage fee cannot be claimed of common right, but if it is of a reasonable amount, may be due by custom. Per *Kelly C. B., Byles and Keating JJ., Martin, Bramwell and Channell BB.*

2. Where a fee has been received for a great length of time, the right to which could have had a legal origin, it may and ought to be assumed that it was received as of right during the whole period of legal memory to the present time, unless the contrary is proved. *Id.*

3. The right to a payment claimed as immemorial may be disproved by proof of its being rank; *i. e.* so large that it could not possibly have existed at the commencement of the time of legal memory. By the same, dissentiente *Keating J.*

4. The Court will take judicial notice of the difference in the value of money at the time of *Richard I.* and the present day. By the same, dissentiente *Keating J.*

5. The parson of an agricultural parish claimed a fee of 13s. on every marriage solemnized in his parish church. A special case found that from 1808 down to 1854 the sum of 13s. or 13s. 6d. had always been paid. Power was reserved to the Court to draw inferences of fact. Held, that the claim could not be supported. By the same, dissentiente *Keating J.*

ERROR from the judgment of the Queen's Bench,
reported 7 B. & S. 725.

The case was argued on the 26th and 27th *November*, 1867; before *KELLY C. B., BYLES and KEATING JJ., MARTIN, BRAMWELL and CHANNELL BB.*

Coleridge (*Prideaux* with him), for the defendant.

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Mellish (*Keane* and *Macnamara* with him), for the plaintiff.

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Coleridge, in reply.

The arguments being the same as in the Court below, it is needless to insert them. It will be sufficient to add that the following authorities were referred to.

Rubric for the Solemnization of Matrimony, contained in the first Prayer Book of *Edward VI.*, A. D. 1549, and the second, A. D. 1552, the latter of which speaks of payment of "the accustomed duty to the priest and clerk," compared with that in force at present. *Litt.* s. 170; 1 *Blackst. Comm.* 78; *Lyndw. Provinc.* 278, ed. 1679; *Constitutions of Archbishop Langton*, A. D. 1222 (a); *Constitutions of Ottobon*, A. D. 1268 (b); 2 *Eagle on Tithes*, 185, and the cases there collected; *Degge's Parson's Counsellor*, 343-5; 2 *Burn Eccl. Law*, 480-481, 9th ed.; 3 *Id.* 84; *Ayliffe's Parergon*, 409; *Com. Dig.* tit. *Toll* (E); 1 *Ro. Ab.* 559, *Customes* (E) 2, 561. (G) 3; *Wats. Clergyman's Law*, 585, 4th ed.; stats. 5 & 6 *Edw.* 6. c. 14; 6 & 7 *W.* 4. c. 85. s. 22.; *Heddy v. Welhouse* (c); *Fermor v. Brooke* (d); *Topsall v. Ferrers* (e); *Coryton v. Lithebye* (f); *Yard v. Ford* (g); *Thompson v. Davenport* (h); *Quo Warranto against the Corporation of Maidenhead* (i); *Burdeaux v. Dr. Lancaster* (j); *Naylor v.*

(a) 2 *Burn. Eccl. Law*, 481, 9th ed.

(b) 2 *Johnson's Eccl. Laws*.

(d) *Cro. El.* 203.

(f) 2 *Wms. Saund.* 112, 115.

(h) *Lutw.* 1059.

(j) 1 *Salk.* 332.

(c) *Moore*, 474.

(e) *Hob.* 175.

(g) 2 *Wms. Saund.* 172.

(i) *Palm.* 76.

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Scott (a) ; Pollard v. Gerard (b) ; S. C. nom. Ballard v. Gerard (c) ; Andrews v. Cawthorne (d) ; Richards v. Dovey (e) ; Fuller v. Say (f) ; Drake v. Wiglesworth (g) ; Veale v. Priour (h) ; Patten v. Castleman (i) ; Lord Pelham v. Pickersgill (j) ; Campbell v. Wilson (k) ; Fleetwood v. Finch (l) ; Palmer v. Moxon (m) ; Gard v. Collard (n) ; Daniel v. Gracie (o) ; The Corporation of Stamford v. Pawlett (p) ; Laybourn v. Crisp (q) ; Spry v. Gallop (r) ; Spry v. The Directors &c. of St. Marylebone (s) ; Beamish v. Beamish (t) ; Gann v. The Free Fishers of Whitstable (u) ; Traherne v. Gardner (v) ; Trotter v. Harris (w) ; Bright v. Walker (x) ; Jenkins v. Harvey (y) ; Shephard v. Payne (z) ; Mills v. The Mayor &c. of Colchester (aa).

Cur. adv. vult.

There being a difference of opinion on the Bench, the following judgments were delivered.

KELLY C. B. This is an appeal from the judgment of the Court of Queen's Bench. The defendant, the rector of *Horton* in the county of *Buckingham*, claims by

(a) 1 *Ld. Raym.* 703.(c) 12 *Mod.* 608.(e) *Willes* 622.(g) *Willes* 654.(i) 1 *Lee* 387.(k) 3 *East* 294.(m) 2 *M. & S.* 43.(o) 6 *Q. B.* 145.(q) 4 *M. & W.* 320.(s) 2 *Curt.* 5.(u) 11 *H. L. C.* 192.(w) 2 *Y. & J.* 285.(y) 1 *C. M. & R.* 877; 2 *ld.* 393.(z) 12 *C. B. N. S.* 414; affirmed on error, 16 *C. B. N. S.* 132.(aa) 36 *L. J. C. P.* 210; *L. R.* 2 *C. P.* 476.(b) 2 *Ld. Raym.* 1558.(d) *Willes* 536.(f) *Willes* 629.(h) *Hardr.* 351.(j) 1 *T. R.* 660.(l) 2 *H. Bl.* 220.(n) 6 *M. & S.* 69.(p) 1 *C. & J.* 57.(r) 16 *M. & W.* 716.(t) 9 *H. L. C.* 274.(v) 5 *E. & B.* 913.(x) 1 *C. M. & R.* 211.

prescription the fee of 10s. as payable to the rector, and 3s. to the clerk, upon every marriage celebrated in the parish, and the question is whether this claim can be maintained.

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The evidence is, that from 1808 until 1854 these fees of 10s. and 3s. have been received and paid (with some slight variations, but which may be dismissed from the case as immaterial), upon all marriages solemnized in the parish; and the question is, whether the Court, (who have the powers of a jury in dealing with the facts), should hold upon this evidence that the claim by prescription to these fees is sustained. The majority of the Judges of the Queen's Bench have determined that it is not, and we are of opinion that this judgment should be affirmed.

The true principle of the law applicable to this question is, that where a fee has been received for a great length of time, the right to which could have had a legal origin, it may and ought to be presumed that it was received as of right during the whole period of legal memory, that is, from the reign of *Richard I.* to the present time, unless the contrary is proved. In this case, the right to these fees may have had a legal origin before the time of legal memory; and the evidence that they have been taken in modern times during a period of nearly fifty years leads to the presumption that they were lawfully taken in the time of *Richard I.*, unless the payment at that time be disproved. But we are of opinion that, considering the difference in the value of money in 1189 and the present time, of which the Court will take judicial notice, it is impossible that the payment of such an amount upon every marriage in this

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parish can have been made at that period, that the objection of rankness therefore applies, that the claim is negatived, and that the plaintiff, who seeks to recover back this fee which he has paid, is entitled to the judgment which he has obtained.

From the importance of the question however, and the difficulties with which it is surrounded from the peculiar and anomalous state of the law, and from the high respect due to the judicial opinion delivered by Mr. Justice *Blackburn*, who dissented from the judgment, it becomes necessary that we should carefully consider and observe upon the objections to the judgment adverted to by him, and which have been urged before this Court with great ability upon the argument at the bar.

It must be admitted on the part of the plaintiff that the receipt of this fee for nearly fifty years is evidence that the payment is immemorial, if it can have had a legal origin, and the contrary be not proved.

Here a legal origin may also be presumed. The payment of these fees was originally voluntary; but where they have been paid before the time of legal memory the title to them as a customary payment is established. But the payment must be immemorial, that is, they must have been paid in the time of *Richard I.*; and it is clear, upon all the authorities, that they can be deemed immemorial only if the payment at that period be not disproved. In *Jenkins v. Harvey* (a) the language of Baron *Parke* is this: That from uninterrupted modern user a jury should find the immemorial existence of the payment, unless some evidence is given to the contrary. And the same case in 2 *C. M. & R.* 393.

(a) 1 *C. M. & R.* 877. 894.

408, is to the same effect. In *Shephard v. Payne* (a), in error (b), *Blackburn J.*, delivering the judgment of the Court of Exchequer Chamber, observes, "Where there has been long continued modern user of a right capable of a legal origin, the existence of that legal origin should be presumed, unless the contrary be proved." This qualification, "that the contrary be not proved," pervades the authorities, and we think necessarily applies to every case of a fixed money payment claimed as immemorial, and which must have existed before time of legal memory. And, looking to the difference in the value of money, we hold it to be impossible that such a sum as 13s. should have been payable as of right upon every marriage in a small rural parish in *England* in the time of *Richard I.*

But it is contended on the part of the defendant that this test of the value of money applies only to cases of modus. We find however no authority whatever for this proposition. In reason, and upon principle, it is impossible to distinguish between the payment of a fixed sum upon a composition for tithes and the like payment as a fee upon the solemnization of a marriage, or upon any other consideration or occasion of the like nature. And Lord *Campbell* appears to have taken this for granted when he applied this test to the fee payable upon admission to a copyhold in the case of *Traherne v. Gardner* (c). Here then the fact, not indeed expressly proved in evidence, but of which, as observed, the Court will take judicial notice, that the difference in the value of money is so great as to render it certain that this payment cannot

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(a) 12 C. B. N. S. 414.

(b) 16 C. B. N. S. 132. 135.

(c) 5 E. & B. 913. 940.

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have been made in the time of *Richard I.*, is proof, and as we think proof conclusive, to rebut the presumption of an immemorial payment arising from the modern usage during fifty years. *Jenkins v. Harvey* (a), to which I have already referred, is cited as an authority for the defendant upon this point ; but the Court there held, and we think rightly held, upon the evidence in that case that 4*d.* per chaldron for the metage of coal, and which included or may have included the use of a port, might well have been received in the time of *Richard I.*, and was therefore not open to the objection of rankness. Besides, it was possible in that case that the port might have been granted with the metage of 4*d.* as a port due within the time of legal memory, and so that the sum was recoverable although not immemorially taken.

Shephard v. Payne (b) is also relied upon by the defendant ; but there the fee claimed by the registrar of the archdeacon for services performed upon a visitation was not a fixed sum but a reasonable sum varying from time to time, though taken immemorially in respect of those services. And we must distinguish between a fixed fee and a reasonable fee. Either may be claimed by prescription, and, if the latter be prescribed for the amount may vary ; indeed, to be reasonable, it should seem that it must vary, for that which is reasonable now can scarcely be said to have been reasonable in the twelfth century.

Upon a careful consideration therefore of the whole of the authorities bearing upon this case, we are unable to find any one instance of the right to a fixed payment being sustained as immemorial, where the amount was

(a) 1 *C. M. & R.* 877 ; 2 *Id.* 393.

(b) 12 *C. B. N. S.* 414 ; affirmed on error, 16 *Id.* 132.

so large as to render it impossible or incredible that it should have been payable as of right in the reign of *Richard I.* The numerous decisions cited as authorities to the contrary will be found to be cases either of a lost grant or charter, or conveyance which may have been made within time of legal memory, or of a claim, as in *Shephard v. Payne* (a), of a reasonable sum varying in amount according to the value of money or other circumstances.

If we assume, as insisted by Mr. *Coleridge*, that in all, or the greater number of these cases, neither Judges nor juries have in reality believed that a grant, or a charter, or a conveyance had ever in fact been made, (or in another class of presumptions, that customs found to be immemorial had actually existed in the time of *Richard I.*), still, if this state of the law created by the Judges to quiet titles, to protect rights derived from long user or enjoyment, and so to supply the want of a just and enlightened legislation, be established by these decisions, we must accept it as we find it, and hold that long user or enjoyment, where a legal beginning is possible, shall be equivalent to a legal right, and that the belief or disbelief in the actual existence of the origin presumed, is not an element in the question. But the law, thus explained and defined, is perfectly consistent with the proposition contended for by the plaintiff here: that where to establish the right claimed a state of things must actually have existed in the time of *Richard I.* which the Court or jury are satisfied cannot by any possibility have existed at that time, no length of user or enjoyment will support the claim. Where a lost grant or charter, or

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conveyance, is presumed in support of a claim to ancient lights, or any other easement, or to give effect to the possession or enjoyment of land for twenty years or more, or to the long receipt of a port due, or of a fee, or any other payment, and which instrument or payment may have been made or originated within time of legal memory, it is at least possible that it may have actually existed; and the law, while it gives effect to claims resting merely upon long possession or user, is at least free from the absurdity of presuming an impossibility. But where, as in the case of a modus, or marriage fee, the law is that the payment claimed must have begun before the time of legal memory, and the amount is so large that it cannot possibly have been made at so early a period, to presume that it was made would be to fly in the face of the law, and to presume an impossibility.

We have thought it right to deliver our opinion upon the important question raised and alone determined in the Court of Queen's Bench; but if it were necessary to consider the other points presented to us in the argument at the bar, we should be prepared to hold that a marriage fee must be a fixed fee and cannot be of a varying amount, and that were it otherwise, the evidence in this particular case would not support the claim to a merely reasonable or varying fee; and further, we should pause before we determined that the sum of 13s. is a reasonable fee to be demanded and enforced upon every marriage in a small country parish, even at the present day. We think, therefore, that the judgment of the Queen's Bench should be affirmed; and in this the whole of the Judges who heard the argument, with the exception of my brother *Keating*, concur.

BRAMWELL B. Without at all dissenting from the judgment of my Lord Chief Baron, I wish to deliver my own reasons, in which my brother *Byles* concurs, for coming to the same conclusion. In this case the question is, whether 13s. is a legal fee or accustomed duty payable on the celebration of a marriage in the parish of *Horton*, and if not, whether there is any and what fee. The latter part of the question may be disregarded, it not being suggested that any fee can be demanded as of right if the fee of 13s. cannot. We are to perform the duties of Judge and jury. In the former capacity it is agreed that we are to say that no fee is due as of common right, but that it may be due if immemorially paid, *i. e.*, from the time of *Richard I.*, and if a reasonable fee. This is the law which we are to pronounce, and to entitle the defendant to a verdict those are the facts we are to find. That being so, I say unhesitatingly that I cannot find this a reasonable fee *now*. It is a week's wages from an agricultural labourer, and it is not reasonable that such a sum should be demanded as of right from such a person for a duty which, properly, should be performed gratuitously. If this is a reasonable amount, it is unreasonably low for the adjoining parishes. Further, I do not believe it has been demanded *as of right*, and paid at any time. It may have been asked for and insisted on in certain cases, but I feel convinced that in many it has not. Evidence was given of thirty marriages from 1808 to 1854, but it is not said there were no other marriages in that period. The conclusion I draw is that the case is the common case of persons holding an office, assumed by those who deal with them to know the rights of the office, always ready to encroach, turn a gratuity into a duty, and whenever the customary gratuity was raised in any particular

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instance by the liberality or piety of the party, ready to treat that as the due in the next case, and obtain it by mixture of request, demand and appeal, to the then payer, that he would not be less liberal than the last. It must not be supposed that I apply this remark to the defendant or any of his predecessors in particular. I have no doubt the fee has not been pressed whenever it could not well be paid, and that it is only demanded as of right now to determine a question of right. Besides, the person who receives the fee is, I believe, the clerk, who probably would have no knowledge whether any thing was due in point of law, or not, but would have a strong interest in claiming that there was. But supposing I got over this difficulty, and that the fee was of such an amount that it might well be paid now, the question would still remain whether I could find, as a jurymen, that it was due as of right in the reign of *Richard I.* Now I am perfectly satisfied it was not. I adopt my brother *Mellor's* language in the Court below (7 B. & S. 725. 737), "Common sense revolts at the idea. * * * I cannot merely say that I am not satisfied it existed, but I am compelled to say that I am satisfied it did not and could not have existed." Nobody believes it did. Nor in the reign of *Edward III.*, when we bear in mind the prices of articles mentioned in the statutes of that reign. The question then is, whether, under these circumstances, we are called upon to do violence to our consciences by finding that this custom dated back to the time of legal memory, when we are convinced that such cannot be the case. Why am I to find the contrary of what I am satisfied is the truth? I would if the law ordered me, leaving the responsibility to the law. If an Act of Parliament said that in certain cases a jury should find black to be white, though one would regret

such trifling with an oath and with the administration of justice, the jury ought so to find. But that is not the law, I am not told I am bound, but advised so to find. Then I regret the advice. It seems to me no technical question of rankness properly arises here. I believe this fee was not paid *two* centuries ago. I am satisfied it was not five centuries back, from the value of money at that time. How can I shut my eyes to this consideration, or, if I receive it, decline to be influenced by it. The doctrine of rankness is not a rule of law; it is a question of evidence, and arises as much with respect to one question as to another, to one date as to another. If a defendant covenanted to pay all fees lawfully payable in the reign of *Edward III.*, rankness, or a question analogous, might well arise. I wish to add I consider this decision quite consistent with the case of *Shephard v. Payne* (a). I think therefore the judgment should be affirmed. It is said this will cause a deal of mischief, and deprive persons of property supposed to be perfectly safe. It is obvious that it will only affect usurped claims. If that is objectionable, the Legislature must set it right. I say with the Lord Chief Justice in the Court below (7 *B. & S.* 725. 751), "Such is the law; and while it so continues, I consider myself in administering it bound to administer it as I find it; nor do I feel myself warranted in undermining or frittering it away by subtle fictions or artificial presumptions, inconsistent with truth and fact."

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KEATING J. The defendant in this case is rector of the parish of *Horton* in the county of *Buckingham*, and claimed to be entitled to a fee of 10s. as payable to the rector, and 3s. to the clerk, for every marriage by banns

(a) 12 *C. B. N. S.* 414; affirmed on error, 16 *Id.* 132.

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(with certificate of the same) celebrated in that parish, and the question is, whether such claim can be maintained.

The evidence as stated in the special case shewed that as far back as living memory went the fee claimed (with certain immaterial variances) had been paid; distinct evidence was given of its receipt from the year 1808, and there was nothing to shew that it was not then an ancient fee. There does not seem to be any doubt that legal origin could be assigned to its payment, and therefore the proof given in this case is that upon which juries in such cases have always been directed that they ought in favour of long continued user to presume it to be immemorial, unless the contrary was proved. In the present case no direct proof in contradiction was given, but it was said that the Court, as a jury, ought not to make the usual presumption because, considering the change in the value of money which has taken place since the reign of *Richard I.*, no such payment as that claimed could have been made at that period, and must therefore have originated within the time of legal memory; in other words that the Court was bound to apply to this case the doctrine of rankness, as it is called, which has been applied in cases where the defence of a *modus decimandi* has been set up in answer to a claim for tithes. Accordingly the majority of the Judges of the Court of Queen's Bench (7 *B. & S.* 725) considered themselves bound by that analogy, and decided that, in consequence of the change in the value of money since the reign of *Richard I.*, the fee claimed in this case could not have been paid at that time, that it was therefore bad for rankness, and upon that ground alone gave judgment for the plaintiff: *Blackburn J.*, however, holding that the doctrine of rankness was not applicable

to such a case, and giving his judgment for the defendant.

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At present the question is, whether the judgment of the majority of the Court of Queen's Bench was right.

The decision is undoubtedly one the importance of which can scarcely be exaggerated, for it is not easy to see how any fees supposed to be payable in respect of marriages, burials, or baptisms, can for the future be sustained if submitted to the same test, even though their existence may have been recognized and their distribution provided for by several Acts of Parliament, nor will its effect be confined to ecclesiastical fees, for a rigid application of the doctrine seems to place in peril many, if not the greater number, of ancient fixed payments supposed until lately to repose securely upon long continued user. That this is not an ill founded apprehension seems clear from the case of *Lawrence v. Hitch (a)*, in which the Court of Queen's Bench, applying the same doctrine of rankness, held that a toll of 1s. claimed as immemorial by a lord of a manor for every cart with vegetables &c. for sale coming within the streets of a market town, could not be sustained (although received as long as living memory went back) upon the single ground that it was rank, and could not therefore have been paid in the reign of *Richard I.*, and *Blackburn J.* felt bound by the authority of the present case to concur in the judgment. It is necessary therefore to see what is meant by this doctrine of rankness as applied to an ancient payment. It cannot be intended that in order to make the fee of 13s. good in the present case the same number of coins called shillings must have been paid in the reign of *Richard I.*, for although the shilling was known in *England* at that time as a measure

(a) *Infra*, p. 467.

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of value, or as it is called "a money of account"—yet as a coin it did not exist, its first appearance as a coin being in the reign of *Henry VII.*, A. D. 1504, nor I apprehend can it have been decided that in order to make an ancient payment good it must have remained unchanged both as to its nominal and real amount since the time of *Richard I.*, inasmuch as that would be simply impossible.

The pound weight of silver which *Henry VII.* coined into 20s. is now coined into 66s., and the copper coinage of *England* is said to date from the reign of *Charles II.* The copper penny of our day as little represents the silver penny of *Richard I.* as the shilling of his time would measure the value of that of the present day. When it is said therefore that to make this payment of 13s. good the same amount must have been paid in the twelfth century, it is difficult to see how that requirement could be satisfied by shewing a payment of another and different amount, as 13s. of that period would certainly be, unless seven or eight ounces of silver can be said to be the same amount as two or three ounces, or that one remains "fixed and certain" by the payment of the other. It would seem therefore, if we are to resort to antiquarian research in order to test the possibility of the existence of a payment in remote ages, the real and not the nominal value would be the more reasonable criterion, the more especially as in times so early as those of *Richard I.* payments seem to have been made in kind, the little and rude money that existed being locked up in the coffers of the barons. But in truth an inquiry into the exact value of money at the period referred to would be useless, as even the research of Mr. *Hallam* could not carry it back farther than the reign of *Henry III.* (a). That its scarcity

(a) *Middle Ages*, vol. 3, p. 369, 11th ed.

and consequently its relative value was very much greater than at present there can however be no doubt, although the way in which it was distributed is full of uncertainty. So also the difficulty is great to ascertain the natural prices either of commodities or labour in an age when they were regulated or rather attempted to be regulated by authority. But it is clear that at a time when the powers of the Church and the Army predominated, any services performed by either would be likely to be largely remunerated. Thus, according to *Hume* (a), so late as the reign of *Edward III.*, when the Statute of Labourers, 25 *Edw. 3. st. 1. c. 3.*, fixed the wages of a master carpenter at 3*d.* a day, the wages of a private soldier were 6*d.*, and the pay of a man at arms 2*s.*

If therefore we are to be driven to speculate upon what might have been the amount of the marriage fees paid to the clergy in those ancient times we may safely presume them to have been very large. In the reign of *Richard I.* marriages were celebrated not in church but at the house of the bridegroom (see *Cripps' Law of the Church and Clergy*, p. 732, 5th ed.); the bull of *Innocent III.* first ordaining the celebration of them in churches being in 1199, the year of *Richard's* death. Consequently the services performed by the priest would not be confined merely to reading the marriage ceremony, but would involve travelling expenses and the labour of writing out the certificate, probably upon vellum,—services which, when performed in those days, and by the clergy, would be sure to command a high rate of remuneration, no doubt rendered in kind. Why therefore are we to assume it to be impossible that a fee corresponding in amount with that now claimed could

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(a) Vol. 2, ch. 16, pp. 524-5.

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have been paid in the reign of *Richard I.*, and why are we to assume it for the purpose of defeating established usage? Of course it cannot be affirmed as a fact that any such payment really was made, but surely the difficulty and uncertainty of the subject shews the wisdom of the long line of Judges who have preceded us in their refusal to enter upon any such inquiry. I say "their refusal to enter upon it," for I am not aware of any case before the present in which a claim to an ancient payment shewn to have been made so far back as living memory extends has been defeated upon the single ground of what is called its rankness, although probably in every case in which an immemorial payment has been sustained such an objection, if valid, would have been fatal. The suggestion that in such cases the immemorial payment has been found by the jury evades but does not get rid of the difficulty, as if the question did not arise before the Court in banco it must have been mooted at *Nisi prius*. But juries have always been directed that they ought to make every presumption in support of established user; indeed, in the well known case of *Jenkins v. Harvey* (a), the Court of Exchequer granted a new trial, because a Judge had told a jury that they might from long continued payment of a port due presume it to have been immemorial, instead of instructing them that they ought so to presume. The presumption of a lost grant was another, perhaps the strongest, illustration of the length to which Judges and Courts have gone in support of established user. "Not," as was said by Lord *Mansfield* in *Eldridge v. Knott* (b), "that in such cases the Court really thinks a grant has been made, because it is not probable a grant should have existed without its being upon record,

(a) 1 C. M. & R. 877.

(b) *Cowp.* 214, 215.

but they presume the fact for the purpose and from a principle of quieting the possession." See this principle discussed at length and fully confirmed by the *Irish Exchequer Chamber* in the recent case of *Deeble v. Linehan* (a), where, the Judge having told the jury in answer to a question by them that they must find as a matter of fact that a deed had been actually executed, the Court of Exchequer Chamber held it to be a misdirection. Indeed the progress of judicial decisions upon this subject cannot be more forcibly described than in the judgment of the Lord Chief Justice in the present case, who designates it as "judicial legislation." (See 7 B. & S. 725. 754). And such it must be admitted to be, but, I apprehend, wise and beneficial legislation, rendered absolutely necessary by the previous "judicial legislation" which established the reign of *Richard I.* as the extent of legal memory. "The Legislature," says the Lord Chief Justice in giving judgment in this case (7 B. & S. 752), "having thus adopted the reign of *Richard I.* as the date from which the limitation in a real action was to run, the Courts of law adopted it as the period to which, in all matters of prescription or custom, legal memory, which till then had been confined to the time to which living memory could go back, should thenceforth be required to extend." The presumption therefore to be made from usage so far as living memory goes back, and the necessity for such presumption,—both stand upon precisely the same "judicial legislation,"—and to insist upon the one and reject the other is, as it seems to me, to accept the bane and refuse the antidote. The doctrine of rankness as applied to cases of modus was of comparatively recent origin, clearly exceptional, and not always acquiesced in. Its origin

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is stated in the case of *Sansom v. Shaw* (a), (cited by Mr. *Harington* in his argument in the case of *Lawrence v. Hitch* (b)), where *Belfield* Serjt. arguendo said, as to rankness he was so old as to remember almost the very beginning. Lord Chief Baron *Ward* first introduced it. "He was a great patron of the clergy, and carried their rights a great way." The Court in the same case treated the doctrine with scant courtesy. Lord Chief Justice *Willes* in giving judgment said, "The first of these objections is, that the modus is too rank, and therefore cannot be so old as the time of *Richard I.*, the time of prescription, for that 10*d.* then would be 20*s.* now. It is said, and I am afraid truly, that there have been many cases determined upon this footing. The fewer, the better; but I am glad they are not in print, for then they might have misled more than they have already * * * It is a strange notion, and most so in the present case. What is it founded upon? that it is not likely that the owners of lands would agree to pay more than the value of the lands. But we cannot go upon presumptions, but proof; and what proof is there of the value of lands in this country at the time of *Richard I.*?" He then expresses an opinion that according to *Litt.* § 170, the time of *Richard I.* was not the time of prescription, adding, "If the time of *Richard I.* was time immemorial in *Henry VI*th's time, the time of *Henry VI.* is immemorial now." Mr. Justice *Burnett* in his judgment in the same case, p. 121, after stating his opinion upon the subject of prescription, proceeds, "My brother *Belfield* has given us the history of the beginning of this doctrine of rank modus in Lord Chief Baron *Ward*'s time, and I have had another case

(a) 2 *Eagle and Younge's Tithe Cases* 120; *M.* 22 *G.* 2. *C. B.*(b) *Infra*, p. 467.

given me by a learned Judge, which shews the end of it, the case of *Giffard v. Webb* (a) in the Exchequer. That was a bill for tithes in kind by the Rector of *Stoke*, and the defendant set up a modus of 8d. for every lamb fallen. It was insisted that this would be equal to 80d. now for every lamb, and was therefore bad. Yet it was decreed in favour of the modus, and the decree was confirmed in the House of Lords on appeal there in 1785, and there was an end of rank moduses : I believe they have never been heard of since." It is needless to say that the anticipations of the learned Judge have not been realised; the doctrine continued to be applied to some cases of modus, but never extended beyond them until the present case. Not to go through the various cases in which ancient payments have been sustained as immemorial, although the objection of rankness, if valid, would have been fatal, and many of which have been adverted to by *Blackburn J.* in his judgment in the Court of Queen's Bench, we may come at once to the recent case of *Shephard v. Payne* (b), where the Court of Common Pleas upheld a claim for immemorial fees of 7s. 6d. and 4s. 6d. payable to the Registrar of the Archdeaconry Court of *Colchester*, upon the ground that a reasonable fee may be claimed by prescription, and that those claimed upon the facts stated in the special case were reasonable. There it was argued that the fees were rank, and that they were so according to the test in the present case there could be no doubt, but that objection was met by the Court holding that the fee "need not be of a fixed and ascertained, but may be of a reasonable amount," p. 433, even if

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(a) Reported in the same vol. p. 28; *nom. Webb v. Giffard*.

(b) 12 C. B. N. S. 414.

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such an objection could be applicable to such a claim. The reasoning in *Shephard v. Payne* appears to me to be equally applicable to the present case. It was said it could only be so when the fee is payable for work and labour done, but here the fee in its origin was probably for work and labour done, and at the present time appears to be so, including as it does the services not only of the clergyman and clerk but also the writing out the certificate of marriage. The case of *Shephard v. Payne* was carried to the Exchequer Chamber (a), and that Court affirmed the decision of the Common Pleas, not upon the ground taken in that Court, as to which the majority gave no opinion, but upon the ground that the facts stated in the case were "such that it should be presumed the fees of 7s. 6d. and 4s. 6d. were immemorial fees attached to the office of Registrar, if that prescription is necessary to give them validity," p. 134. Now that those fees were rank according to *Bryant v. Foot* (b) I should have thought nobody could seriously doubt. To suppose that the Registrar of the Archdeacon of *Colchester* really received those identical fees in the reign of *Richard I.* is at least as difficult to believe as that the fees now claimed were then paid to the rector of *Horton*. Yet the Court decided (notwithstanding such rankness) that the ordinary presumption from long user ought to be made. That decision therefore appears to me to be a distinct authority against the decision of the majority of the Court of Queen's Bench in the present case. It was said in the Court below that the point of rankness was not taken by the learned counsel who argued the case of *Shephard v. Payne* for the plaintiff in the Court of Exchequer Chamber. The fact that Mr. *Mellish* did not take the point, considering he was on the losing side and wanted a good point, is

(a) 16 C. B. N. S. 132.

(b) 7 B. & S. 725.

in itself not without significance, but it certainly was taken in the Court of Common Pleas, and although it was not formally taken in the Exchequer Chamber, yet that it was present to the mind of that Court in giving judgment seems clear from the terms of the judgment itself. "The true rule," says *Blackburn J.*, in delivering the judgment of the Court in *Shephard v. Payne* (a), "seems to be laid down by Lord *Wensleydale*, then *Parke B.*, in *Jenkins v. Harvey* (b), where he says that 'the correct mode to direct a jury is to tell them, that from uninterrupted modern usage, they should find the immemorial existence of the payment (if that be necessary for its validity), unless some evidence is given to the contrary,' or, as he says, in delivering the written judgment of the Court on the second trial of the case (c), from proof that an office existed in 1752 'the jury may and ought to presume it to be prescriptive, if that be necessary to make it valid, *unless the contrary be proved.*' The claim in that case was by the corporation of *Truro* for a metage due of 4*d.* per chaldron for coals in that port: and it was supported. I mention this as shewing what is meant by the latter part of the sentence quoted. I suppose neither the Barons of the Exchequer nor the jurors, as antiquaries, believed that 4*d.* per chaldron was actually paid before *Richard I.* returned from the *Holy Land*: but the modern user was enough to cast upon the other side the onus of proving that it was a usurpation. * * * We think, therefore, that, if it be necessary for the validity of these fees that fees of that amount should be immemorial, that presumption ought to be made." This was the judgment of *Pollock C. B.*, *Channell B.*

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(a) 16 C. B. 132. 135.

(b) 1 C. M. & R. 877. 894.

(c) 2 C. M. & R. 393. 407.

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and *Blackburn* and *Mellor* JJ., *Brammoell* B. agreeing with the Court of Common Pleas, both in their judgment and the reasons upon which it was founded, in support of which see also the authorities collected in the judgment in the case of *Mills v. The Mayor &c. of Colchester* (a). Upon these grounds therefore, and, agreeing as I do with the judgment of *Blackburn* J. in the Court below, I am of opinion that the claim of the defendant to the fees in question cannot be defeated upon the ground of rankness as applied by the majority of the Court of Queen's Bench.

There remains the question of fact, are the fees claimed reasonable? And, looking to the statements in the special case, I cannot say they are otherwise. It appears that the fees claimed, including the certificate, have been paid without demur, as far as living memory extends, and they would probably have so continued had not the clergyman insisted upon what he had no right to insist on, namely, prepayment. It appears also, that although the fees claimed are considerably higher than in the majority of the neighbouring parishes yet that the fees in some are the same, and in one or two somewhat larger than those here claimed; nor do I think the charge to the labourer of the fees claimed less reasonable or more opposed to public policy than the demand of 5s. by the lay registrar. The Marriage Acts themselves recognize a difference in the remuneration for similar work to the clergyman and to the registrar, and the labourer can be married, if he pleases, at the statutable price.

Upon the whole I am of opinion that the judgment of the Court of Queen's Bench ought to be reversed.

Judgment affirmed (b).

(a) 36 *L. J. C. P.* 210; *L. R.* 2 *C. P.* 476 (b).

(b) See the next case.

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IN THE EXCHEQUER CHAMBER.

LAWRENCE *against* HITCH.Monday,
May 11th.

The plaintiff claimed under the lord of the manor of *C.* as lessee of the street tolls and markets of the town of *C.* The manor was granted by *Hen.* 3 to the inhabitants of *C.*, with a market and fair there, for a term of four years from 1220. *Car.* 1, by letters patent, granted it in fee to *H.*, and all tolls and markets within it. From time immemorial till 1786 there was a market house belonging to the lord of the manor in the High Street of *C.*, and tolls immemorially paid, "as well of the market as for articles hawked about the town, and for stalls and standings for the sale of articles erected in the streets." This right was recognised and confirmed by several local Acts; 26 *G.* 3. *c.* 116. *s.* 43., 46 *G.* 3. *c.* 117. *s.* 125., 1 & 2 *G.* 4. *c.* cxxi. *s.* 140., and 15 & 16 *Vict.* *c.* 1. *s.* 133. In 1807 the *C.* Commissioners appointed under stat. 46 *G.* 3. *c.* 116. became lessees of the tolls, which were taken of a certain amount from 1806 to the time of the present action. Upon one of the boards exhibited in 1841 it appeared that a toll was taken payable by all persons hawking about the town fish, fruit, vegetables, or any other article for which no toll had been before paid in the market, of, *inter alia*, 1*s.* for every cartload; and for many years previous to the year 1841, and as long as living witnesses could remember, and continuously down to the time of the action, a similar board with similar words and figures had always been fixed in a conspicuous part of the market house at *C.* for the time being. The Court having power to draw inferences of fact: Held, that the claim of toll was good, because

Prescription.
Grant.
Toll traverse.
Dedication of
highway.
Licence to rest
upon land.

1. It ought to be inferred that the toll had existed from time immemorial.

2. If not, still a lawful origin of the toll within the time of legal memory, by means of a contemporaneous dedication of the streets to the public and a reservation of the toll by the Crown, ought to be inferred.

3. A toll reasonable in amount, but varying from time to time according to the value of money, is valid in law.

4. Although a toll traverse, *i. e.*, a toll for the mere use of a public way, is bad, this toll was not merely for passing and repassing, as it imported a licence to rest and stay upon the land for the purpose of selling merchantable commodities.

ERROR on a judgment of the Court of Queen's Bench, delivered in *H. T.*, 1867, *January* 23rd, on a special case, which was argued, in *T. T.*, 1866, *June* 5th, by *Mellish* (*Sawyer* and *Harington* with him), for the plaintiff, and *Macnamara* (*Powell* with him), for the defendant.

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This was an action for a toll, called a street toll, of 1s. in respect of a cartload of vegetables exposed for sale in a street within the town and manor of *Cheltenham*, and for which no toll had been before paid in the market. There was also a count for disturbing the plaintiff's market.

The cause having come on to be tried at the *Gloucestershire* Spring Assizes of 1865, a verdict was entered for the plaintiff by consent, subject to the opinion of the Court of Queen's Bench upon a special case to be stated by an arbitrator. A very long case was stated accordingly, of which the following were the essential parts: the Court to have power to draw inferences of fact, if necessary.

The plaintiff was the lessee under a lease of tolls, commonly called street tolls, and also of the markets of the town of *Cheltenham*, granted to him on the 2nd *September*, 1863, by *Robert Sole Lingwood*, lord of the manor, and who held the manor, in which manor the town and parish of *Cheltenham* are comprised, under a conveyance from Lord *Sherbourne* dated the 7th *January*, 1863. Lord *Sherbourne* had been lord of the manor from 1813 until the making of the above conveyance to the plaintiff.

The manor of *Cheltenham* was granted by *Henry III.* to the inhabitants, together with a market and fair there, for a term of four years from the year 1220. King *Charles I.*, in the third year of his reign, by letters patent under the great seal, granted to *C. Herberd* and others, and their heirs and assigns, the manor of *Cheltenham*, with all rents of assize, free and customary lands within the lordship or manor, and, inter alia, all and all manner of tolls within the lordship, manor

and hundred of *Cheltenham*; and all and singular tolls by reason of all and singular markets, fairs and marts within the lordship, manor and hundred aforesaid.

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The lordship, manor and hundred of *Cheltenham*, with all customs and tolls within them, and the tolls of markets, fairs and marts so granted by those letters patent, became vested in 1806 in the then Lord *Sherbourne*, and passed from him through his successors in the title to *Lingwood*, the lessor of the plaintiff.

From time immemorial until the year 1786 there was a market house in the High Street of *Cheltenham* belonging to the lord of the manor, and various tolls, as well of the market as for articles hawked about the town, and for stalls and standings for the sale of articles erected in the streets, had been immemorially paid.

In 1786 the public local Act, 26 *G. 3. c. 116.*, was passed for paving and lighting the town of *Cheltenham*, under which the market house was pulled down, and a new market house erected. By sect. 43 it was enacted, that nothing in that Act should extend to prejudice the lord of the manor of *Cheltenham*, or the lord of the fairs and markets within the town, of any power, privilege, franchise, or authority, but that all such should be exercised and enjoyed in as full and ample a manner as if that Act had never been passed. A similar provision was contained in another Act, 46 *G. 3. c. 117. s. 126.*; and stats. 1 & 2 *G. 4. c. cxxi. s. 140.* and 15 & 16 *Vict. c. 1. s. 133.* are to the same effect. In 1807 the *Cheltenham* Commissioners appointed under the Act of 1806 became the lessees under Lord *Sherbourne* of the tolls of the market and town; and the Commissioners under that Act and the subsequent Acts took the tolls of the town and markets, which had also

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been subsequently let by auction. The tolls had been thus taken, of an amount appearing by printed handbills and upon painted boards set up for the purpose, from 1806 until the present time. Upon one of the boards exhibited in 1841 it appeared that a toll was taken payable by all persons hawking about the town fish, fruit, vegetables, or any other article for which no toll had been before paid in the market, of, inter alia, 1s. for every cartload : and for many years previous to the year 1841, and as long as living witnesses could remember, and continuously down to the time of the action, a similar board with similar words and figures had always been fixed in a conspicuous part of the market house at *Cheltenham* for the time being.

The defendant was a market gardener living at *Shardington*, a village about three miles from the town of *Cheltenham*, and had a garden and premises there. He was in the habit of coming into *Cheltenham* on the market days with a horse and cart laden with vegetables, such as potatoes, cabbages and carrots, and fruit, such as apples and pears. There were places set apart in the *Cheltenham* market house for the sale of all such, and he would be allowed to sell his goods in such market house, in which there was ample room for the purpose, if he chose, on payment of the customary toll. Instead however of using the market house he hawked the goods about the streets of *Cheltenham*, within the manor of *Cheltenham*, and was engaged in doing so and in selling his goods in those streets and near to the place where the market was holden. On each of the days mentioned in the particulars of demand, one of which was a market day, the plaintiff or a person employed by him for the purpose demanded the toll of 1s. of the

defendant in respect of his cartload of goods, with which the defendant declined to comply.

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The questions for the opinion of the Court were: whether, upon the facts stated,

First. The defendant had incurred any liability in respect of the toll claimed?

Secondly. Whether he had disturbed the plaintiff's market so as to be legally liable for such disturbance?

On this state of facts the Court below, conceiving itself bound by the decision in *Bryant v. Foot (a)*, gave judgment for the defendant.

The case was argued, *February* 1, 3, before KELLY C. B., WILLES, KEATING and SMITH JJ., and CHANNELL B.

Harington, for the plaintiff.—First. There is good evidence that this toll existed by prescription. Its having been paid as far back as *living* memory goes is evidence from which, unless rebutted, a jury would be directed to presume that it existed from the time of *legal* memory; *Rex v. Joliffe (b)*. [*Macnamara*, for the defendant, intimated that he should not dispute that.] And this presumption can only be rebutted by actual proof; mere counter presumption is not sufficient, for, if once admitted, where would it stop? Were this even otherwise, the presumption of all others on which the least reliance can be placed is that based on a supposed difference in the value of money at the time of *Richard I.* and at the present day. No description of coin in use now would have represented this sum at that period, and there have been great changes in the constitution of the country as well as of the habits of society;

(a) 7 B. & S. 725.

(b) 2 B. & C. 54.

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3 *Hallam Midd. Ag.* 369, 11th ed. (a). [*Willes J.* Have you looked as an antiquary at the tolls paid in ancient times?] There is mention of a case in *Keilwey* 152a, pl. 54, in the time of *Edward III.*, where a toll of 2d. was taken for "chescun charret de choses vendables," being much the same as at the present day. It will be argued that this toll is rank. But the doctrine of rankness is quite modern, *Sansom v. Shaw* (b), *Webb v. Giffard* (c); and is confined to cases of *modus decimandi*; *The Prior of Tikeford v. The Prior of Caldwell* (d). [*Kelly C. B.* I do not see how that case either helps or hurts you.] There are many cases of tolls in which the objection of rankness might have been taken if it were tenable; *Anon.* 21 *H.* 7. 40, pl. 61; *Vinkersterne v. Ebdon* (e), *Bennington v. Taylor* (f), *Wilkes v. Kirby* (g). The sole authority for its applicability to tolls is the dictum of Lord Campbell in *Traherne v. Gardner* (h). In *Jenkins v. Harvey* (i) the Court say it does not apply to *port* duties. In order that this prescriptive claim be good it is not requisite that the same fixed toll was taken in the time of *Richard I.*, it is enough that a *reasonable* toll has always been taken since that period, although it may have varied in amount from time to time; 2 *Inst.* 222; *Com. Dig. Market* (F. 1); *Id. Toll* (E.); *Wright*

(a) Vol. 2, p. 518, 4to ed.

(b) 2 *E. & Y.* 120.

(c) 2 *E. & Y.* 28.

(d) 34 *H.* 6. 36.

(e) 1 *Ld. Raym.* 384; *S. C. nom. Vinkestone v. Ebdon*, 1 *Salk.* 248, 5 *Mod.* 359; *S. C. nom. Vinkestine v. Ebdon*, 12 *Mod.* 216.

(f) 2 *Lutw.* 1517.

(g) 2 *Lutw.* 1519.

(h) 5 *E. & B.* 913. 940.

(i) 1 *C. M. & R.* 877; 2 *Id.* 393.

v. Brewster (a); *Shephard v. Payne (b)*; *Mills v. The Mayor &c. of Colchester (c)*; *Drake v. Wiglesworth (d)*; *Gard v. Callard (e)*; *Mayor &c. of Colchester v. Brooke, per Coltman J. (f)*; *Free Fishers of Whitstable v. Gann, per Lord Wensleydale (g)*. [*Kelly C. B.* referred to the case of the *Quo Warranto against The Corporation of Maidenhead (h)*.]

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Secondly. It is not necessary that this toll should have existed during all the time of *legal* memory. It is enough if circumstances are shewn from which the Court can presume that it had a legal origin since that period. This manor was in the hands of the Crown from the time of *Henry III.* to that of *Charles I.*, within the time of legal memory, which may have dedicated these streets to the public, reserving a toll for the right of passage; *Richards v. Bennett (i)*; *The Mayor of Carlisle v. Wilson (j)*; *Sir John Lade v. Shepherd (k)*; *Lord Pelham v. Pickersgill (l)*; *Crispe v. Belwood (m)*. *The Marquis of Stafford v. Coyney (n)* also is an authority that there may be a limited dedication of a highway to the public. [He cited *Fisher v. Prowse* and *Cooper v. Walker (o)*; and *Willes J.* referred to *Dovaston v. Payne (p)*.]

Thirdly. Independent of the question of toll, this

(a) *Gunning on Tolls*, 62, 63; *S. C. nom. Wright v. Bruister*, 4 B. & Ad. 116.

(b) 12 C. B. N. S. 414. 433.

(c) 36 L. J. C. P. 210. 216; L. R. 2 C. P. 476. 484-5.

(d) *Willes* 654.

(e) 6 M. & S. 69.

(f) 7 Q. B. 339. 355.

(g) 11 H. L. C. 192. 214.

(h) *Palm*, 76.

(i) 1 B. & C. 223.

(j) 5 East 2.

(k) 2 Str. 1004.

(l) 1 T. R. 660.

(m) 3 Lev. 424.

(n) 7 B. & C. 257.

(o) 2 B. & S. 770.

(p) 2 H. Bl. 527.

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action is maintainable for disturbance of the plaintiff's market. *Prince v. Lewis* (a) may be relied on by the defendant, but it is rather an authority for the plaintiff, as here the case finds that there was room for the defendant in the market. [He also cited *Bridgland v. Shapter* (b).] It will perhaps be urged that there is no evidence of the plaintiff being lord of this market. [*Macnamara* said that he should not take that point.]

Macnamara, for the defendant. — Modern user is sufficient ground for presuming a user during the time of *legal* memory, but this is only unless no proof is given to the contrary. One mode of disproving it is by proof of rankness, a doctrine which is by no means limited to claims of *modus decimandi*. In *Traherne v. Gardner* (c) Lord Campbell recognized its applicability to fees claimed to be payable by custom. [*Kelly* C. B. That is only an obiter dictum.] Rankness is not a rule of law, but a rule of evidence, 2 *Blackst. Comm.* 31; 2 *Eagle on Tithes* 185-6; and has a very salutary effect in preventing fees becoming outrageous and oppressive. The argument that the objection of rankness might have been raised in many cases where it was not is only a negative argument of little value. Again, the amount of this toll shews that it could not have existed in the time of *Richard I.*, when, as appears by an inquisition held A. D. 1194, the price directed to be set on a bull or a cow was 4s., upon a plough horse the same, upon a sheep with fine wool 10d., upon a sheep with coarse wool 6d., upon a boar or sow 12d.; *Annals of Roger de Hovenden*, by *Reilly*, vol. 2, p. 337.

(a) 5 B. & C. 363.

(b) 5 M. & W. 375.

(c) 5 E. & B. 913. 940.

The same appears from the Statute of Labourers, 25 *Edw.* 3. *st.* 1., and Magna Charta, 9 *H.* 3., which enacts, c. 21, that "No sheriff nor bailiff of ours, or any other, shall take the horses or carts of any man to make carriage, except he pay the old price limited, that is to say, for carriage with two horse, 10*d.* a day; for three horse, 14*d.* a day." [He also referred to *Fleetwood Chronicon Pretiosum*, pp. 60-76; *Chapman v. Smith* (a), and *Heddy v. Wheelhouse* (b).

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Secondly. This is a case of a toll thorough, which being against common right, *Gunning on Tolls* 27, *Fitzh. Abr. Toll*, pl. 3, a consideration for it must appear; *Mayor of Nottingham v. Lambert* (c). Here is none, either present or continuing. If this toll were not imposed simultaneously with the dedication to the public of the right of way over these streets, it could not be imposed afterwards; *Rex v. The Corporation of London* (d). The cases cited are distinguishable. *Anon. M.* 21 *H.* 7, 40, pl. 61, was a case of claiming by prescription a pound, a thing which is in the nature of a penalty. *Vinkersterne v. Ebdon* (e) and *Wilkes v. Kirby* (f) were cases of port duties, and *Bennington v. Taylor* (g) was a claim to stallage in a fair. *Mills v. The Mayor &c. of Colchester* (h) was the case of a licence to fish. *Lord Pelham v. Pickersgill* (i) and *Richards v. Bennett* (j) were concluded by the finding of the jury, and *The Mayor &c. of Carlisle v. Wilson* (k) and *Crispe v. Bellwood* (l) do not affect the case.

(a) 2 *Vez.* 506. 514.

(b) *Cro. El.* 558.

(c) *Willes* 111.

(d) 2 *Show.* 263. 266.

(e) 1 *Ld. Raym.* 384; *S. C. nom. Vinkestone v. Ebdon*, 1 *Salk.* 248; 5 *Mod.* 359; *S. C. nom. Vinkestine v. Ebdon*, 12 *Mod.* 216.

(f) 2 *Lutw.* 1519.

(g) 2 *Lutw.* 1517.

(h) 36 *L. J. C. P.* 210. 216; *L. R.* 2 *C. P.* 476. 484-5.

(i) 1 *T. R.* 660.

(j) 1 *B. & C.* 223.

(k) 5 *East* 2.

(l) 3 *Lev.* 424.

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Thirdly. As to the second count. In order to constitute disturbance of a market there must be a fraud upon the market and deliberate evasion of its tolls. The owner of a market may sue for his tolls, but, having consented to a person coming into his market and selling there, he cannot afterwards complain of his disturbing it. The action for disturbance of market will not lie where there has been acquiescence; *Holcroft v. Heel* (a), *Curwen v. Salkeld* (b), *Mayor &c. of Brecon v. Edwards* (c).

Harington, in reply.—Toll thorough and toll traverse are much confounded in the old books. *Heddy v. Wheelhouse* (d) is at variance with the more recent decision of *Wright v. Brewster* (e); and *The Mayor of Brecon &c. v. Edwards* (f) is irrelevant.

The Court said the case had been very well argued on both sides.

Cur. adv. vult.

Judgment was now delivered by

KELLY C. B. After a full statement of the facts, his Lordship proceeded. We think, having power to draw inferences of fact, that upon this evidence we ought to find, as indeed in substance the arbitrator has found, that this toll has been taken from time immemorial; and, further, supposing that by reason of its amount or upon any other ground, it cannot be held to have been payable and paid as early as the reign of *Richard I.*, we are of opinion that if it can have had a

(a) 1 B. & P. 400.

(b) 3 East 538.

(c) 1 H. & C. 51.

(d) Cro. El. 558.

(e) *Gunning on Tolls*, 62, 63; S. C. nom. *Wright v. Bruister*, 4 B. & Ad. 116.

(f) 1 H. & C. 51.

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HITCH.

lawful origin within time of memory such lawful origin ought to be presumed. If, however, it is to be considered as a toll claimed to have been taken from time immemorial, and the objection of rankness be made on the authority of *Bryant v. Foot* (a), and supposing that objection to apply to a toll at all, we must take the finding altogether; and it appears as part of that finding, and of the prescription so found, that no less than 2s. 6d. was taken as a toll or payment for the use of the ground by placing upon it a stall for the sale of provisions, and payable to the occupier of the house opposite to which the stall was placed. If then we are bound by those findings, and must take the streets and markets to be immemorial, so we must admit the payment of 2s. 6d. for a stall, which if really paid in the time of *Richard I.* would make a toll of 1s. for a cartload of provisions a perfectly reasonable payment, and so put an end to the objection of rankness.

But even if this or any other objection could prevail, treating the claim as immemorial, still it is clear we may dispense with the claim by prescription, and presume a lawful origin of the toll by means of a contemporaneous dedication of the streets to the public, and a reservation of this toll on the part of the Crown; such dedication and reservation having been made within time of memory.

Whether therefore the toll be claimed by prescription or have been granted or reserved within time of memory, we think, that the claim is sustainable unless the doctrine of rankness apply, and the amount of the tolls (1s. per cartload) be considered rank, in which case the claim can be sustained only upon a grant or reservation within time of memory.

(a) *Ante*, p. 444.

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It has been doubted whether a sum certain is not necessary upon a grant or reservation of toll; but the contrary was held by three Judges against one in the case of *The Corporation of Maidenhead* (a). And in the case of *Wright v. Brewster* (b), where, upon a motion to enter a verdict for the defendant after a trial at *Hertford*, before Lord *Tenterden*, a toll was claimed of 1d. on the sale of a pig in a market, and it appeared that the amount of toll had not been uniform during the period of sixty years to which the evidence extended, but at one time 6d. per score, at another 4d., and latterly 1d. each had been taken on the sale of pigs, *Taunton J.*, during the argument, expressed an opinion that under a grant of reasonable toll, or under a prescription, which supposes such a grant, the amount might vary from time to time according to the varying value of money. And the Court sustained the verdict establishing the claim to toll on the ground that the Court could not take upon itself to say that the amount of toll was unreasonable. This case determines that a toll, reasonable in amount but varying from time to time according to the value of money, is valid in point of law. So in *Shephard v. Payne* (c), where a fee was claimed by a Registrar of the Court of the Archdeacon, which had been immemorially taken but had varied considerably from time to time in amount, it was held by the Court of Common Pleas that the claim to the fee might be sustained, if of reasonable amount; *Willes J.* in delivering the judgment of the Court observing, "A fee need not necessarily be of a fixed and ascertained,

(a) *Palmer's Rep.* 76.

(b) *K. B. Nov.* 5th, 1832; *Gunning on Tolls*, 62, 63.

(c) 12 *C. B. N. S.* 414.

but may be of a reasonable amount." This doctrine is affirmed by the same Court in the case of *Mills v. The Mayor of Colchester* (a); and the decision in *Shepherd v. Payne* (b), approved and held to be supported by many authorities: 1 *Blackst. Comm.* 78, *Com. Dig. Toll* (E.), *Drake v. Wiglesworth* (c), *Gard v. Callard* (d), *Ballard v. Gerard* (e) and *Fuller v. Say* (f).

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If therefore this toll be claimed as immemorial, and the objection of rankness could be held to apply by reason of the amount of 1s., it is an answer to that objection that the claim is to a reasonable toll only, and that the amount may vary from time to time, with the value of money. But the claim may also be sustained as to a toll granted or reserved within time of memory, on the ground that upon the facts stated we may presume a dedication by the Crown between the time of *Henry III.* and *Charles I.* of the streets and ways within the town to the public, which would constitute a good consideration for a grant or reservation of the toll now claimed.

It has also been argued that this toll is bad as being a toll for the mere use of a public way: but my brother *Willes* has justly observed that this is not a toll for passing and repassing; but that it imparts a licence to rest and stay upon the land for the purpose of selling marketable commodities; and is analogous to the decision in *Ellis v. The Mayor, &c. of Bridgnorth* (g), and that the spot upon which the articles are exposed for sale in effect becomes part of the market.

(a) 36 *L. J. C. P.* 210. 216; 2 *L. R. C. P.* 476.(b) 12 *C. B. N. S.* 414.(c) *Willes* 654.(d) 6 *M. & S.* 69.(e) *Holt* 596.(f) *Willes* 629, n.(g) 15 *C. B. N. S.* 52.

1868. The judgment, therefore, of the Queen's Bench, which

LAWRENCE appears to have been delivered without reasons assigned
 ^{v.}
HITCH. upon the authority of the decision in *Bryant v. Foot* (a),
 must be reversed, and judgment entered for the
 plaintiff.

Judgment for the plaintiff (b).

(a) *Ante*, p. 444.

(b) See the preceding case.

Monday,
May 11th.

HUDSON *against* EDE.

(Reported, vol. 8, pp. 631. 639.)

Monday,
May 11th.

FITZPATRICK *against* BOURNE.

[Reported ante, pp. 157. 174.]

END OF EASTER VACATION.

CASES

1868.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

TRINITY TERM,

XXXI. VICTORIA.

The Judges who usually sat in Banc in this
Term were:

COCKBURN C. J.		MELLOR J.
BLACKBURN J.		LUSH J.

In the matter of HILL, Gentleman, one, &c.

Thursday,
May 28th.

1. Misconduct for which the Court would either refuse or defer the admission of an attorney is ground for either striking an attorney off the roll or suspending him from practising, though the misconduct be not in his character of attorney.

2. An attorney acting as managing clerk to a firm of attorneys completed the sale of property belonging to a client of the firm, and appropriated part of the purchase money to his own use. Upon the discovery of the fraud a year afterwards he admitted the fact, and repaid the amount. Upon motion to strike him off the roll the Court suspended him from practising for one year.

3. Where an attorney charged with a criminal offence denies his guilt, the Court will not try the issue on affidavits.

*Application to
strike attorney
off the roll.
Conduct as
attorney's
clerk.
Criminal
offence.*

1868.

Re
HILL.

MAY 4. *Murray* obtained a rule on behalf of the *Incorporated Law Society*, calling upon *Robert Raby Hill*, an attorney of this Court, to shew cause why he should not be struck off the roll.

It appeared from the affidavits that *Hill*, who had been admitted an attorney, was engaged by Messrs. *Hargrove, Fowler & Blunt*, attorneys and solicitors, as their managing clerk, and continued in their employment from *October*, 1863, till *April*, 1865. In *March*, 1865, while acting as such, he completed the sale of certain property belonging to Mr. *Webster*, a client of Messrs. *Hargrove, Fowler & Blunt*. In *February*, 1866, Messrs. *Hargrove, Fowler & Blunt*, in settling their accounts with *Webster*, discovered that *Hill* had received from the solicitors of the purchaser 85*l.*, the balance of the purchase money, and had never accounted for it to the firm. He had then left their employment, and they wrote to him demanding an explanation. He called upon them and admitted having appropriated the money and offered to repay the amount, which they, after some time taken for consideration, accepted. He also admitted that he had not accounted to the firm for a sum of 8*l.* 14*s.* which he had received for the defendant's costs in an action brought against *Webster*, in which the plaintiff was nonsuited.

In an affidavit on shewing cause *Hill* stated that he was in great distress when he appropriated the 85*l.* to his own use, and had always intended to repay it so soon as he was able, but that up to the time of the discovery of the fraud he had not been able to do so, in consequence of having to support his wife and

family and to contribute in part to the maintenance of his aged parents, and that the omission to give the firm credit for the 8*l.* 14*s.* was accidental and not intentional. Since he left the employment of Messrs. *Hargrove, Fowler & Blunt* he had been in practice at *Ipswich* from *April*, 1865, to *January*, 1866, in partnership with another attorney, and since the latter date on his own account, and there were affidavits that during those three years he had conducted himself with propriety in his character of attorney in the transactions in which he had been engaged.

1868.

Re
HILL

Holl shewed cause.—At the time of the misconduct of which *Hill* was guilty he was not acting as attorney but as attorney's clerk. [*Cockburn* C. J. What authority is there for the exercise of this jurisdiction when an attorney is charged with an indictable offence and has not been convicted? *Murray*, in support of the rule.—In *Re Blake* (a), where there was not the relation of attorney and client, *Crompton* J. said, p. 40, "The law as to the summary jurisdiction of the Court over attorneys, as its officers, as laid down in the books of practice, is of wider extent than Mr. *Dowdeswell* is ready to admit;" and he cited *Chitty's Archbold's Practice* (ed. 11, by *Prentice*), p. 146, *Lush's Practice* (ed. 2, by *Stephen*), p. 218 (b); and *Blackburn* J. said, p. 41, "It is not necessary, in order to induce the Court to interfere in a summary manner, that the misconduct charged should either amount to an indictable offence or arise out of a transaction in which the relation of attorney and client subsists between the attorney and the person against whom he has been guilty of miscon-

(a) 3 *E. & E.* 34.(b) 3rd ed., by *Dixon*, p. 320.

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 Re
HILL.

duct. Thus, in *Stephens v. Hill* (a), Alderson B. says, 'The question in this case is, whether the attorney has so misconducted himself in his character of an attorney, as to be an unfit person to remain on the roll.' 'If persons are to be accredited by the Court it is our duty to watch over and control their conduct.'" *Lush J.* The misconduct in *Re Blake* (b) did not amount to an indictable offence. But in *Re King* (c) the Court struck an attorney off the roll who had been convicted on an indictment for a conspiracy to defraud notwithstanding judgment was reversed for insufficiency of the indictment.] In *Re Blake* the attorney was on account of his professional position entrusted with the deed of which he made a fraudulent use.—He then addressed the Court in mitigation.

Murray, in support of the rule.

COCKBURN C. J. The precise circumstances of the present case, namely, an act of delinquency committed by an attorney's clerk who at the same time was an attorney though not then acting as such has not hitherto come before the Court, but we ought not the less to entertain the application and deal with the case. I abide by what I said in *Re Blake* (b). Where an attorney commits a fraud, or does that which involves dishonesty, it is for the interest of suitors that the Court should interpose and prevent him from having the opportunity of using his power as one of its officers to defraud those who retain his professional services. In the present case, if the attorney had been proceeded against criminally a

(a) 10 M. & W. 28. 34.

(b) 3 E. & E. 34.

(c) 8 Q. B. 129.

1868.

Re
HILL.

conviction for embezzlement must have ensued, and upon that conviction being brought before us we should have been bound to act. If there were a conflict of evidence on the affidavits the Court would not interfere until there had been a conviction, but the person against whom this application is made does not dispute the facts. If these facts had been brought to our attention on an application to admit him as an attorney we should either have refused to admit or deferred the admission for a period of time. We are equally bound to take notice of the misconduct of a person who has been admitted an attorney, and deal with it according to the circumstances.—His Lordship then adverted to the circumstances of mitigation on the one hand, and to the fact that the repayment of the money was not spontaneous on the other, and said, we are not called upon to go to the extent of striking this person off the roll, but we cannot do less than suspend him from practising as an attorney for twelve months.

BLACKBURN J. When we are called upon in the exercise of our summary jurisdiction to order an attorney to perform a contract to pay money or to fulfil an undertaking, the contract must have been made or the undertaking given by him in his character of attorney, or connected with it. But in the case of misconduct of an attorney amounting to a crime, the principle we act upon is that we are bound to see that the suitors of the Court are not exposed to placing their interests in the hands of improper persons; and the inquiry is much the same as when we have to consider whether a person is fit to be admitted an attorney. I adhere to *Re Blake (a)*, in accordance with which, although the mis-

(a) 3 E. & E. 34.

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Re
HILL.

conduct is not in a matter directly connected with the character of attorney, we must consider what effect it has upon the fitness of the applicant to be entrusted with the interests of suitors as an officer of the Court. If the offence is committed in the character of an attorney it is more dangerous to the interests of suitors though the moral guilt may be the same. I also agree with my Lord that where the offence is denied it would be wrong to try on affidavits whether a man has committed a criminal offence ; which is a question to be tried before a jury.

MELLOR J. I will only add that it would be very dangerous to allow immunity to exist because the attorney when he committed the offence charged against him was not acting as attorney but as attorney's clerk, and because we are not exercising jurisdiction over the admission of the person to be an attorney.

LUSH J. I am of the same opinion. Where the misconduct is of such a character as would prevent a person being admitted as an attorney we are bound to take notice of it after he has been admitted, whether by striking him off the roll or suspending him from practice, according to the circumstances.

Rule absolute to suspend *Hill* from practising as an attorney of this Court for a year.

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TERRY *against* HUTCHINSON.*Monday,
June 1st.*

1. An action for seduction is supported by evidence that the daughter who was under the age of twenty-one, being discharged from service, was returning home at the time of the seduction, and was on her return received into her father's house.

2. In estimating the damages the jury may take into account the expense of maintaining a bastard child, and the dishonour done to the plaintiff and his daughter.

*Action for
seduction.
Service.
Damages.
Bastard child.*

THIS was an action for the seduction of the plaintiff's daughter.

Pleas. First. Not guilty. Second. That the daughter was not the servant of the plaintiff.

Issues thereon.

On the trial, before *Hannen J.*, at the Sittings in *Middlesex* during this Term, it appeared that the plaintiff was a bricklayer and builder at *Canterbury*. On the 13th *March*, 1867, his daughter, who was nineteen years of age, went into the service of a linendraper at *Deal*. On the 11th *April* her master discharged her for misconduct and gave her the month's wages due on the 13th. While she was on her way home the defendant seduced her. She was received into her father's house and delivered of a child, of which the defendant was the father. The jury found a verdict for the plaintiff, damages 150*l.*, leave being reserved to move to enter a nonsuit or verdict for the defendant.

Montagu Chambers now moved accordingly, or for a new trial on the ground of the damages being excessive. —First. The seduction must take place at the time when the daughter is in the service of her father or mother.

1868. Here the daughter would have been justified in considering herself as servant of her master at *Deal* until the 13th *May*, and might have claimed a month's wages in advance. She could not assent to terminate a contract which must be taken to have been for her benefit. [*Blackburn J.* The jury must have found that she had so misconducted herself as to justify her dismissal. And even if the dismissal were wrongful the service was ended, and damages only, not wages, were recoverable.]

TERRY
v.
HUTCHINSON.

As to the amount of damages; the jury took into account the expense of maintaining the child. But the plaintiff cannot recover by reason of his liability to the future support of a grandchild. [*Cockburn C. J.* On the trial of such an action as this I never heard a Judge tell a jury that they must not take into account the expense of maintaining a grandchild. *Mellor J.* I have often heard the observation addressed by counsel to a jury that the mother might obtain the expense of maintaining her child from the defendant by applying for a bastardy order; but it never produced any effect upon them. Such an application might not be successful for want of evidence corroborating that of the mother.]

COCKBURN C. J. There will be no rule. As to the objection that at the time of the seduction the daughter was not part of her father's family or under his control, I am of opinion that the action will lie. It could not be disputed that if she had reached home and then the seduction had taken place the action would have lain. Does it make any difference that it was during the transitus to her father's house? She entered into the service at *Deal* with the animus revertendi so soon as the term of service should be legally terminated; it did

come to a legal termination, for it must be taken that her master dismissed her for sufficient cause; and having a claim to become a member of her father's family she was received by him. Suppose her father had gone to fetch her, she would have been under his control and dominion; so, if he had written to her and given her directions to do some act of business for him on her way home. To all intents and purposes a constructive service with her father began at the time she left the service of her master at *Deal* with the intention of returning home. This action depends on technical grounds not very creditable to our law; but it is brought substantially for the injury received by the father: and it would lead to very mischievous consequences if he had not the same redress for a seduction when his daughter was on her way home as when she had reached it. Therefore we ought not to cast any doubt on the point by granting a rule.

On the question of damages, even if the jury took into account the maintenance of the child, though that does not necessarily appear, I should not disturb the verdict. The doctor's fees are now allowed to be included in the damages, and the expense of maintaining the child stands on the same footing. If the woman can apply for an order of affiliation the jury ought to take that into consideration; but in the present case that was not put to them.

BLACKBURN J. This is in form an action by the master for a wrongful act of the defendant which has caused the sickness of his servant and thereby deprived him of her services; and while it remained strictly of that nature the damages were nominal. But as Lord *Ellen-*

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borough said, in *Irwin v. Dearman* (a), it has been long established that a parent or guardian has a right to bring the action to recover damages for the injury *ultra* the mere loss of service. The loss of service however is still the technical ground of the action; and technical proof only of service is necessary, otherwise the action would long since have ceased. In *Maunder v. Venn* (b) *Littledale* J., who was a most learned pleader and more than most Judges inclined to support technicalities of pleading, which was his only fault, said, p. 324, "The right to the service is sufficient. I remember Lord *Alvanley* so ruling, and I have always myself been of the same opinion." That is quite correct. The question therefore is, whether at the time of the seduction the father had a right to the services of his daughter? If he had, he becomes entitled to substantial damages. Here, as soon as the daughter being under the age of twenty-one had ceased to be under the control of her master and intended to return home, her father had a right to her services, and that proves his natural right to be her guardian.

As to the amount of damages. The jury may now give compensation not merely for the loss of service, which in most cases would be very slight, but for the injury suffered by the parent. And the fact of a bastard child being born cannot be excluded from their consideration, though it would be wrong merely to calculate how much its maintenance would cost: it was an aggravation of the injury to the feelings of the parent which they might take into account.

(a) 11 *East* 23, 24.

(b) *M. & M.* 323.

MELLOR J. This action stands on grounds somewhat exceptional. But it is clear that where the father has a right to the service and control of his daughter he is entitled to maintain the action without proof of actual service. It is said, the daughter being under the age of twenty-one, her assent to be discharged from a contract of service which was *primâ facie* for her benefit could not be given, but the father received her back and therefore there was abundant evidence of his assent. As to the objection that the seduction took place before she had returned to her father's house, the illustrations put by the Lord Chief Justice are conclusive. And the cases cited in *Dean v. Peel* (a) are abundant authority that as soon as the contract with the master ends and the daughter has the *animus revertendi*, although she is not actually in her father's house, the relation between the father and child is sufficient to maintain the action.

As to the amount of damages. I agree that they are not confined to the actual damages caused by the wrong, but may include the dishonour done to the daughter and the father.

LUSH J. The authorities justify us in holding that in the present case the implied relation of master and servant between the father and daughter had revived, and that there was a constructive service when the seduction took place.

Rule refused.

(a) 5 East 45.

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Wednesday,
June 3rd.

BROUGH, appellant, HOMFRAY and others,
respondents.

Coal mine.
Ventilation.
23 & 24 Vict.
c. 151. s. 10.
rule 1.

By stat. 23 & 24 Vict. c. 151. s. 10. rule 1., "an adequate amount of ventilation shall be constantly produced in all coal mines or collieries and ironstone mines to dilute and render harmless noxious gases to such an extent that the working places of the pits, levels, and workings of every such colliery and mine, and the travelling roads to and from such working places, shall, under ordinary circumstances, be in a fit state for working and passing therein." Held, that rule 1. was not confined to the ventilation of the working places and travelling roads, but required that so much of the mine must be kept ventilated as to render the working places and travelling roads safe.

CASE stated pursuant to stat. 20 & 21 Vict. c. 43.

At a Petty Sessions for the division of *Bedwelty*, in the county of *Monmouth*, an information was preferred by the appellant under sects. 10 and 22 of stat. 23 & 24 Vict. c. 151., charging that the respondents, being the owners of a certain colliery called *The Bedwelty Pit*, did not cause an adequate amount of ventilation to be constantly produced in it to dilute and render harmless noxious gases to such an extent that the working places of the pits, levels and workings of the colliery, and the travelling roads to and from the working places, should under ordinary circumstances be in a fit state for working and passing therein.

It appeared from the case and the evidence which accompanied it that in the colliery called *The Bedwelty Pit*, of which the respondents were owners, there was a heading known as *Robert's Heading*, with *Lower End* and *Fore End*: the *Lower End* leading towards the up take pit; the *Fore End* being in solid unworked coal. The ventilation of the colliery passed down the pit into

a crossing towards the Lower End of *Robert's Heading*, in which crossing a door was placed. Above the point at which this door was placed was a short crossing leading to the Fore End of *Robert's Heading*; and the effect of closing the door was to divert the air into the Fore End and produce a ventilation of it. The driving on the Fore End of *Robert's Heading* and the working of coal therein had been temporarily discontinued for eighteen months before the beginning of *June*, 1865. For five or six days before the 14th *June*, a man was employed in the Fore End to put it in order for resuming operations and working coal therefrom. But in consequence of the door in the crossing being taken down for the purpose of enlarging and converting it into a roadway, the ventilation in the Fore End of *Robert's Heading* ceased and it became filled with gas, and the man employed there discontinued his work. On the 14th *June* the foreman, finding that the door had been taken down, put up fences and warning signals across the small crossway and above the point where the crossing entered *Robert's Heading*, so as to prevent access either to the small crossway or to the Fore End of *Robert's Heading*. On the 16th *June* an explosion took place in *Robert's Heading*, by which several persons were killed; but how it occurred could not be ascertained.

It was found that there was no intention to resume work in the Fore End of *Robert's Heading* until the ventilation had been properly restored, and there was evidence that it would have been dangerous to replace the door till *Saturday*, when the men would be out of the colliery.

The magistrates dismissed the information on the

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ground that they were of opinion that the top of *Robert's Heading* mentioned in the evidence before them was not a working place on the 16th *June*, 1865, within the meaning of the first rule set forth in sect. 10.

The question raised for the opinion of the Court was, whether on the 16th *June*, 1865, there was a wilful violation of that rule.

By stat. 23 & 24 *Vict. c. 151. s. 10.*, "The following rules (hereinafter referred to as the general rules) shall be observed in every colliery or coal mine and ironstone mine by the owner and agent thereof.

"1. An adequate amount of ventilation shall be constantly produced in all coal mines or collieries and ironstone mines to dilute and render harmless noxious gases to such an extent that the working places of the pits, levels, and workings of every such colliery and mine, and the travelling roads to and from such working places, shall, under ordinary circumstances, be in a fit state for working and passing therein :

"2. All entrances to any place not in actual course of working and extension, and suspected to contain dangerous gas of any kind, shall be properly fenced off so as to prevent access thereto :"

Sect. 22. If any coal mine, colliery, or ironstone mine be worked, and any of the general rules which ought to be observed by the owner and principal agent or viewer of such coal mine, colliery, or ironstone mine, be neglected or wilfully violated by any such owner, agent or viewer, such person shall be liable to a penalty not exceeding 20*l.*

Manisty (*Matthews* with him), for the appellant.—The

right construction of stat. 23 & 24 *Vict. c. 151. s. 10.*, rule 1, is that the mine is to be kept ventilated so as to make the working places, workings, and travelling roads safe. [He was then stopped.]

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H. James, for the respondents.—Stat. 23 & 24 *Vict. c. 151. s. 10.*, rule 1, requires that ventilation shall be produced in the working places of the pits, &c. : rule 2 requires that the entrances to any place not in course of working, and suspected to contain dangerous gas, shall be properly fenced off so as to prevent access thereto ; and that has been complied with. [*Mellor J.* Rule 2 is an additional precaution, and does not narrow rule 1. *Blackburn J.* The fencing off is intended to be by bars, &c., so that workmen with candles may not have access to the place ; it is not an hermetically sealing up the place.]

COCKBURN C. J. It is not enough that the working places of the pit are kept ventilated. The intention of the Legislature was that so much of the mine as might operate upon the working places, workings, and travelling roads should be kept in a proper state of ventilation : this however would not include miles of unworked parts of the mine. The justices thought it sufficient if the working place itself was ventilated. But rule 1 is violated if a working place is not ventilated by reason of a defective ventilation of a part adjoining which is not worked.

BLACKBURN J. The language of rule 1 is so clear that it hardly needs explanation. It does not say that an adequate amount of ventilation shall be produced in the

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working places of coal mines, but "in all coal mines to such an extent that the working places of the pits, &c., and the travelling roads to and from such working places," may be in a fit state for working and passing therein. The justices seem to have thought that it was confined to the working places and travelling roads in which the men were.

MELLOR J. concurred.

LUSH J. The duty of the owner of a colliery is so to ventilate the mine as to prevent an inroad of gas into the working places or travelling roads from other parts of the mine.

Case remitted.

Wednesday,
June 3rd.

ANGELL, appellant, The Vestry of PADDINGTON,
respondents.

*Metropolis
Management
Acts, 1855,
1862, 18 & 19
Vict. c. 120.
s. 105., 25 & 26
Vict. c. 102.
s. 77.
Paving new
street.
Church.*

A church surrounded with a strip of land opposite to a row of houses abutted upon a new street, the site of the church having been conveyed to the Commissioners for building churches. Held, that the church was not liable to be assessed to the expenses of paving the new street, as it was not a house within The Metropolis Management Act, 1855, 18 & 19 Vict. c. 120. s. 105., nor land within The Metropolis Management Amendment Act, 1862, 25 & 26 Vict. c. 102. s. 77., nor were the Commissioners owners within either statute.

CASE stated by a Metropolitan Police magistrate pursuant to stat. 20 & 21 Vict. c. 43.

Upon a summons obtained by the respondents against the appellant for that he, being the owner of certain premises in *Warrington Gardens*, in the parish of *Paddington*, abutting upon a new street about to be paved by the respondents, had neglected to pay the sum of 14*l.* 3*s.* 2*d.*, his share of the estimated expenses of

such paving, the magistrate made an order for payment.

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The following entry in the books of the vestry of *Paddington* was put in evidence by the respondents.

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"At a meeting of the vestry held &c. The Rev. Canon *Boyd*, minister, in the chair.

"*Warrington Gardens* not being paved to the satisfaction of this vestry. Resolved, that the same be forthwith paved throughout the whole breadth of the carriage way and footpaths thereof, and that the estimated expense amounting to 83*l.* 9*s.* 4*d.* of providing and laying such pavement and of paving the same be and the same are hereby apportioned to and charged upon the respective owners or occupiers of the land and houses bounding or abutting upon or forming such street in manner following, and that the same be demanded and recovered accordingly."

The amount was apportioned to the owners of Nos. 1, 2, 3, 4, 5 and 6, *Warrington Gardens*.

The appellant was the owner of the house numbered 1.

There was a church surrounded with a strip of land opposite the row of houses mentioned in the resolution of the vestry and abutting upon the road in question, and no occupiers or owners had been assessed in respect of this church and land either as a house or land.

The respondents put in evidence a certified copy extracted from the Registry of the Diocese of *London* of a conveyance bearing date the 13th *March*, 1856, and made by the Right Rev. *Charles James*, late Bishop of *London*, to the Commissioners for building new churches, whereby the plot of land on which the church of *St. Saviour's* now stands was given by the Bishop to the Commissioners and their successors, to be devoted, when

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consecrated, to ecclesiastical purposes for ever, by virtue of the Acts of Parliament therein mentioned. Also a certified copy of an Act of Consecration of the church, extracted from the Registry of the Diocese of *London*, from which it appeared that on the 12th *April*, 1856, the Bishop of *Oxford*, under a commission from the late Bishop of *London*, consecrated the church for the celebration of Divine service. These documents were appended to the case.

The parish of *Paddington* had laid down in the street between the church and *Warrington Gardens* a narrow kerb stone abutting on the plot of land, and designed either to mark its limits or protect the iron railings from vehicles.

It was objected by the appellant that the resolution of the vestry was not in accordance with the provisions of The Metropolis Management Act, 1855, 18 & 19 *Vict. c. 120. s. 105.*, or The Metropolis Management Amendment Act, 1862, 25 & 26 *Vict. c. 102. s. 77.* And that the owners or occupiers of the houses called *Warrington Gardens*, the same being on one side of the street only, were improperly assessed with the whole amount of the estimated cost of repairing the road. The appellant also contended that the laying down the kerb stone was an act of ownership on the part of the parish, from which it must be inferred that the parish had adopted the street and was therefore alone liable for the whole of its repairs, and that it did not appear that the marginal piece of land abutting on the roadway was included in the consecration, and therefore exempted from chargeability with a proportionate part of the expense of putting the roadway in repair.

It was contended by the respondents that the church in

question was neither house nor land abutting upon the new road within the meaning of the Acts, and that no owner or occupier thereof could properly be assessed under the powers given by the Acts. And that the owners or occupiers of the houses, although the same were situated on one side only of the road, were properly assessed with the whole amount of the estimated cost of repairing it.

The magistrate decided that no adoption of the street by the parish was necessarily to be inferred from the circumstance that the kerb stone had been laid down. And that the marginal piece of land must be taken to be consecrated to the purposes of Divine service, and made an order for payment of the sum of 14*l.* 3*s.* 2*d.*

If the Court should be of opinion that the resolution of the vestry and the apportionment of sums to be paid by the owners or occupiers of the houses and land abutting on the new road in *Warrington Gardens* were bad in law because no assessment had been made therein of owners or occupiers of the church or marginal piece of land abutting upon the new road, or because the whole amount of the estimated cost of repairing that road had been assessed upon the owners or occupiers of the houses referred to in the resolution of the vestry, then the order was to be cancelled; but if otherwise, the same was to remain in force.

The opinion of the Court upon the other two points decided by the magistrate was also prayed.

The Metropolis Management Act, 1855, 18 & 19 *Vict. c.* 120. *s.* 105. "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate,

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be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases, such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor, for the time being, of the vestry or board);" &c.

The Metropolis Management Amendment Act, 1862, 25 & 26 *Vict. c. 102. s. 77.* "Where any vestry or district board shall, under the powers given by" the 105th section of stat. 18 & 19 *Vict. c. 120.*, "have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced or during its progress, or after its completion;" &c.

Dowdeswell (*Macnamara* with him), for the respondents.
 —First. A church is not a house within the meaning of

stat. 18 & 19 *Vict. c.* 120. *s.* 105. There is no definition of the word in the interpretation clause, sect. 250. In some sections, as sects. 120, 121, "building" as well as "house" is mentioned. Sect. 81, which mentions "house" only, requires appurtenances, viz., watercloset or privy and ashpit," which are inapplicable to a church. [*Lush J.* By sect. 141, the owners or occupiers of houses in streets are to mark them with a number under the direction of the Metropolitan Board, and if the occupier of any house neglects to do so the board may cause it to be marked with a number: is this church to be marked with a number?] Further, there is no owner of it, within the definition of that word in sect. 250, upon whom a demand or order for payment of the expenses could be made.

Secondly. A church is not land within stat. 25 & 26 *Vict. c.* 102. *s.* 77., which for the first time makes the owners of land liable to these expenses. That section makes a distinction between houses and land; therefore the latter word cannot mean land covered with buildings. [*Blackburn J.* The only doubt would be whether, if a piece of land which was chargeable under sect. 77 was built upon, it would cease to be land within that section.] This church was built before the passing of stat. 25 & 26 *Vict. c.* 102. But these expenses are only charged on buildings liable to the poor rate, from which churches are exempted by stat. 3 & 4 *W. 4. c.* 30. *s.* 1. [*Mellor J.* The word "building" is used in various senses in stat. 25 & 26 *Vict. c.* 102., and must be interpreted reasonably in each section.—His Lordship referred to sects. 74, 85.] As to the strip of land round the church, it is accessory to the church; and is not land any more than the fore court of a house.

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Brown (*Patchett* with him), for the appellant.—The word “house” in stat. 18 & 19 *Vict. c. 120. s. 105.* includes other buildings besides a dwelling house, otherwise warehouses, shops and stables would be exempt. [*Cockburn C. J.* That makes against the argument that “land” in stat. 25 & 26 *Vict. c. 102. s. 77.* means more than land in its popular sense.] The definition of “owner” in sect. 250 of stat. 18 & 19 *Vict. c. 120.* only intends to point out which of two classes should be chargeable. Sect. 162, which continues the rateability of public buildings under that Act, excepts places of religious worship; but sect. 105 contains no such exemption. [*Mellor J.* If sect. 162 had not contained that exception it might have been thought that stat. 3 & 4 *W. 4. c. 30. s. 1.* was repealed. *Blackburn J.* That does not touch this question.] At any rate the strip of land round the church is chargeable. [*Mellor J.* It cannot be so in the hands of trustees who receive no rent for it.]

COCKBURN C. J. It is sufficient to say that a church is neither a house within sect. 105 of the former nor land within sect. 77 of the latter statute.

BLACKBURN J. A third reason in support of the order is that the Commissioners for building churches are not owners within either statute.

LUSH J. concurred.

Judgment for the respondents.

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In the matter of a **Plaint between BROWN**
against COCKING and others.

Wednesday,
June 10th.

By The County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 11.*, "all actions of ejectment, where neither the value of the lands, &c., nor the rent payable in respect thereof," exceeds 20*l.* by the year, may be brought in the County Court. Held,

1. That the test of the jurisdiction of the County Court is the value or rent as between the litigant parties, and not the value or rent as between the lessee and a sublessee.

2. That where a County Court Judge had decided that the annual value did not exceed 20*l.*, and there was evidence to support his decision, this Court could not grant a prohibition; per *Cockburn C. J.* and *Lush J.* *Hannen J.* *hæsitante.*

County Courts
Act, 1867,
30 & 31 Vict.
c. 142. s. 11.
Ejectment.
Annual value
or rent.
Jurisdiction
of County
Court.
Prohibition.

MAY 22nd. *Inderwick* obtained a rule calling on the Judge of the County Court of *Cornwall* holden at *Redruth*, and the plaintiff, to shew cause why a writ of prohibition should not issue to prohibit the Judge from further proceeding in this plaint, which was in ejectment to recover the possession of a dwelling house, described in a statement annexed to the summons: the annual value of the premises was stated to be 18*l.* 7*s.* 6*d.*, and the rent paid in respect thereof 19*l.* 10*s.*

On the hearing before the Judge it was objected that he had no jurisdiction to entertain the plaint, inasmuch as the rent payable in respect of the premises exceeded the sum of 20*l.*

In 1802 the property was let by indenture on a building lease for a term of ninety-nine years, determinable upon three lives, of which the defendant *Cocking* was the last surviving; the other defendants were his tenants. In the lease was a proviso for re-entry in case

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of nonrepair. In 1865 the house was conveyed to the plaintiff in fee, subject to the lease of 1802. It had been divided into three small tenements, two of which were let at rents amounting to 24*l.* The plaintiff gave evidence that 24*l.* was not a fair criterion of the rent at which that part of the premises would let to an ordinary tenant, one of the tenements being sublet furnished, and that the annual value was 18*l.* 7*s.* 6*d.*

The Judge decided that the annual value did not exceed 20*l.*, and gave judgment for the plaintiff.

Lush J., upon an application at Chambers, had refused to issue a prohibition.

By The County Courts Act, 1867, 30 & 31 *Vict. c.* 142. *s.* 11., "All actions of ejectment where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of twenty pounds by the year, may be brought and prosecuted in the County Court of the district in which the lands, tenements or hereditaments are situate."

Cole and *Lopes* now shewed cause.—First. Stat. 30 & 31 *Vict. c.* 142. *s.* 11. gives two tests for determining whether the County Court has jurisdiction. 1. The annual value; for the rent might be a peppercorn, or the premises might be in the hands of the owner of the fee and no rent be paid. And that value must be the value as between the litigant parties, and not the improved value. 2. The rent "payable" in respect of the premises must not exceed the annual value of 20*l.*, payable by the defendant to the plaintiff; otherwise the plaintiff would never know whether he might bring ejectment in the County Court, for he does

not know what rent is payable by the sublessee to his lessee.

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Secondly. It was a question of fact for the Judge what was the value of the premises, and, there being evidence before him which supports his decision, this Court will not interfere by prohibition; *Joseph v. Henry* (a), per *Coleridge J.*, referring to *Thompson v. Ingham* (b), *In re Bowen* (c), *The Guardians of the Lexden and Munster Union v. Southgate* (d). [*Lush J.* referred to *Reg. v. Allen* (e).]

Inderwick (*Keane* with him), in support of the rule.—First. The rent payable by the occupier is the test intended by stat. 30 & 31 *Vict. c. 142. s. 11.* [*Lush J.* The corresponding sections in stat. 19 & 20 *Vict. c. 108.* for recovering possession of premises when the interest has expired, or been determined by notice, or one half year's rent is in arrear, throw light on this. In sects. 50 and 52 of that statute the rent "payable" must be the rent paid to the plaintiff who is seeking to recover possession.] Those sections apply to landlord and tenant. In stat. 30 & 31 *Vict. c. 142. s. 11.* the rent intended is that payable by the person in occupation of the premises.

Secondly. The Court has jurisdiction to grant the writ of prohibition, the decision of the County Court Judge in the present case being on an issue collateral to the merits. In the case of *In re Bowen* (c) it was the duty of the County Court Judge to ascertain the amount

(a) 1 *L. M. & P.* 388.(b) 14 *Q. R.* 710.(c) 21 *L. J. Q. B.* 10; 15 *Jur.* 1196.(d) 10 *Exch.* 201.(e) 7 *B. & S.* 902.

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of the debts owing by the trader, not simply for the purpose of giving himself jurisdiction, but for determining what was the estate of the trader and how it was to be disposed of. In *Reg. v. Allen* (a) title was an essential element in the inquiry before the justices, and their decision was upon the facts which were of the very essence of the enquiry. [He cited *Bunbury v. Fuller*, in error (b), and cases cited in note to *Crepps v. Durden*, 1 *Smith L. C.* 693, 6th ed.] In *Reg. v. Nunneley* (c) and *Reg. v. Huntsworth* (d) the Court overruled a decision of the justices that an objection to a church rate was not made bonâ fide. [*Lush J.* That was on the ground of the proviso in stat. 53 *G. 3. c.* 127. *s.* 7. that if the validity of the rate, or the liability of the person from whom it is demanded, be disputed and the party disputing the same give notice thereof to the justices, they shall forbear giving judgment: they have no power to inquire whether the grounds of disputing the rate are valid.] Prohibition was issued in *Thompson v. Ingham* (e), and that case may stand with *In re Bowen* (f). [*Lush J.* In *Thompson v. Ingham* (e) it was admitted by the plea that title was in question, and therefore the County Court Judge had no jurisdiction.]

COCKBURN C. J. The County Court Judge was right on both points.

First. On the merits he was right in saying that he

(a) 7 *B. & S.* 902.

(b) 9 *Exch.* 111. 140.

(c) *E. B. & E.* 852.

(d) 33 *L. J. M. C.* 131.

(e) 14 *Q. B.* 710.

(f) 21 *L. J. Q. B.* 10; 15 *Jur.* 1196.

had jurisdiction, for the question incidentally before him was the annual value or rent of the premises as between the litigant parties ; and it is immaterial that by the rent which the lessee received from another person he had created a different value as between himself and that person. The annual value may be greater than the rent reserved and would be so in most cases, but the jurisdiction of the County Court depends upon the value as between the litigant parties. The Legislature prescribed that test in order to prevent suits being brought in the superior Courts which might as well be decided by the County Courts. The Legislature must have used the phrase in the same sense as in actions of debt.

Secondly. Whether the Judge was right or not he determined the matter as a question of fact. It was incumbent on him to go into evidence on the subject, irrespective of the merits, in order to see whether he had jurisdiction, and we cannot review his decision. We control the County Court so as to keep it within the legitimate sphere of its jurisdiction, and if it decides without evidence that a case is within its jurisdiction, or if, in order to avoid hearing a case which it is its duty to hear and determine, it refuses to go into evidence, this Court will interfere. But when the Judge has properly investigated that which is the foundation of his jurisdiction, this Court will not inquire whether his conclusion on the balance of evidence was right or not. We do not review his decision on a question of fact as we should the verdict of a jury in a cause in this Court.

LUSH J. The first question is, whether the County

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Court Judge put the right construction on sect. 11 of stat. 30 & 31 *Vict. c. 142.*, and I think he did. The meaning of the phrase "the rent payable in respect thereof" is a question of law. Does it mean the rent payable by the defendant to the plaintiff, or the rent payable to the defendant by his subtenants? Clearly it means the rent as between the litigant parties. In order to give the County Court jurisdiction neither the value nor the rent by the year must exceed 20*l.* If the rent payable by the defendant to the plaintiff does not exceed 20*l.*, and the defendant gets more than 20*l.* by subletting, that may be a good element to determine the value; but the Judge was right in his construction as to the rent.

Secondly. Is the decision of the County Court Judge on the question of value liable to be reviewed by prohibition? There was evidence on both sides, and it is impossible to say that he was not bound to form his decision on it, for if he was of opinion that the value exceeded 20*l.* he had no jurisdiction to proceed. Then, there being evidence to justify his decision, it is conclusive. Prohibition does not issue unless the Judge of the County Court has done something which he was not authorized by the statute to do.

HANNEN J. The phrase in stat 30 & 31 *Vict. c. 142. s. 11.*, "the rent payable," means the rent payable between the litigant parties, not the rent payable by any sublessee to any sublessor. The argument that the statute intended to make the rent conclusive as to value cannot extend to the rent payable by a sublessee. If the rent as between the parties does not

exceed 20*l*. the next inquiry is as to the annual value of the premises. The fact that some other person is paying more rent than 20*l*. is strong evidence that the annual value exceeds 20*l*., but is not conclusive. Whether the real value exceeded 20*l*. or not the case equally serves to illustrate the discrepancy between rent and value, for the evidence was that the rent paid to the lessee was enhanced by the fact that some portions of the premises were let by him furnished, which would rebut the presumption that that rent represented the annual value.

As to the other point, I have some hesitation in concurring in the judgment that we are absolutely concluded by the decision of the Judge on conflicting evidence; but in a case like the present, where the evidence is so nicely balanced, we ought not to interfere.

Rule discharged, without costs (*a*).

(*a*) See the next case.

In the matter of a Plaintiff between ELSTONE
against ROSE.

[Thursday,
November
12th.]

By The County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 11.*, "All actions of ejectment where neither the value of the lands, &c., nor the rent payable in respect thereof, shall exceed the sum of 20*l*. by the year," may be brought in the County Court. In ejectment against the occupier by the assignee of a term subject to a ground rent, the County Court Judge was of opinion that by deducting the ground rent the annual value of the premises was reduced below 20*l*., and therefore he had jurisdiction. Held,

1. That the value intended in sect. 11 is the marketable value of which the rent paid by the tenant to the immediate landlord is, in the absence of exceptional circumstances, a fair criterion.

2. That, the County Court Judge having adopted an erroneous test of value, this Court would grant prohibition.

County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 11. Ejectment. Annual value. Jurisdiction of County Court. Prohibition.

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BROWN
v.
COOKING.

1868.

In re
ELSTONE
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IN *Trinity* Term,

Ryalls obtained a rule calling upon the Judge of the County Court of *Yorkshire* holden at *Sheffield*, and the plaintiff, to shew cause why a writ of prohibition should not issue to restrain the Judge of the County Court and the Registrar of the Court from issuing a warrant of execution for the recovery of the possession of certain tenements, and to prohibit other proceedings upon a judgment in a plaint in that Court.

The action was brought to recover possession of a dwelling house, which was held under a building lease granted on the 17th *November*, 1864, for ninety-nine years, at a ground rent of 9*l.* 17*s.* The plaintiff claimed as assignee of the term, which had been sold by the mortgagees of the lessee under a power of sale. The defendant had obtained possession under a contract for sale with the lessee after the mortgage.

At the hearing it was objected that the Judge had no jurisdiction under The County Courts Act, 1867, 30 & 31 *Vict. c.* 142. *s.* 11., inasmuch as the value of the premises, as well as the rent payable in respect thereof, exceeded 20*l.* by the year. There was conflicting evidence before him as to the value, but he decided that it did not exceed 20*l.*, and gave judgment for the plaintiff.

Upon a summons, before *Smith J.* at Chambers, for a prohibition, there were conflicting affidavits as to the grounds of the judgment of the County Court Judge, and, as he declined to give the reasons of it, a copy of a shorthand writer's notes was procured, which it was admitted were substantially correct. It appeared from them that the Judge held that according to the proper

construction of sect. 11 the ground rent must be deducted from the gross annual value, and therefore he had jurisdiction. The learned Judge referred the matter to the Court.

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Oppenheim shewed cause. — First. By the word “value” in stat. 30 & 31 *Vict. c. 142. s. 11.* is intended the value to the litigant parties; *In re Brown v. Cocking (a)*. [*Cockburn C. J.* The value of property to the lessor is different from its value to the lessee. *Lush J.* The same property would have a different value according as the action was brought by the superior or by the immediate landlord. *Blackburn J.* The value of property is what it might be reasonably expected to fetch in the market. By stat. 6 & 7 *W. 4. c. 96. s. 1.* the rateable value of property is to be determined by the rent which a hypothetical tenant from year to year would give, subject to certain deductions.] If that estimate is made in the present case the ground rent is an outgoing which should be deducted.

Secondly. This is not a case for prohibition, the Judge having decided upon conflicting evidence as to the value; *Joseph v. Henry (b)*, *The Guardians of the Lexden and Munster Union v. Southgate (c)*, *In re Brown v. Cocking (a)*. [*Cockburn C. J.* Here was no dispute as to the facts.]

Ryalls, in support of the rule, was not called upon.

COCKBURN C. J. This rule must be made absolute.

(a) *Ante*, p. 503.

(b) 1 *L. M. & P.* 388.

(c) 10 *Exch.* 201.

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The first point is whether, in ascertaining the annual value of a house or premises so as to give or exclude the jurisdiction of the County Court Judge to try an action of ejectment under stat. 30 & 31 *Vict. c. 142. s. 11.*, the amount payable as ground rent to the superior landlord is to be deducted from the rent paid by the tenant to his immediate landlord. The Judge of the County Court was of opinion that, irrespective of the ground rent, the value was above the sum which limits the jurisdiction of that Court, but by deducting the ground rent the value was reduced below that sum. Sect. 11 has left the meaning of the word "value" uncertain. When a ground rent is to be paid there must be a difference between the value to the landlord and the value to the tenant. It might be worth while for the tenant to pay a rent of 200*l.* a year for a house in respect of which a ground rent of 20*l.* was payable, whereas the value of the house to the landlord must be taken as reduced to 180*l.* What criterion of value are we to adopt? The Legislature have dealt with the question in a case of not dissimilar character to the present. The test applied by stat. 6 & 7 *W. 4. c. 96.* to ascertain the value of houses and land for the purpose of assessing them to the poor rate is the rent at which they might reasonably be expected to let from year to year; that is a parliamentary exposition of rateable value, and, reasoning by analogy, we may say that the marketable value of the property is that intended by stat. 30 & 31 *Vict. c. 142. s. 11.*; and of that the rent paid by the tenant to his immediate landlord is, in the absence of exceptional circumstances, the best criterion. Therefore the County Court Judge was wrong.

The second point is whether this is a case for prohibition. When there is a conflict of evidence as to fact on which the jurisdiction of the County Court Judge depends, although if we see that he has perversely decided his decision is not conclusive, yet, if there is reasonable ground for upholding his decision, this Court will not interfere by prohibition where he has honestly and fairly exercised his judgment upon the evidence before him. But where there is no conflict of evidence, and, by reason of an erroneous decision in point of law, he has exercised an authority or jurisdiction which does not by law exist, then prohibition should issue.

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BLACKBURN J. On the first point I agree with the decision in *In re Brown v. Cocking* (a) that the rent intended by stat. 30 & 31 *Vict. c. 142. s. 11.* is the rent as between the parties to the action, and the fact that other persons had agreed for a higher rent than that paid by the defendant is not conclusive as to the value. In the case of mineral property the annual value of the subject-matter would change though the rent payable to the owner of the mine would remain the same, so that the subletting value is not conclusive. A ground rent affects the value of the interest of the lessor, who pays it, but not the value of the subject-matter in respect of which the action is brought. It is to be ascertained much in the same way as the rateable value under The Parochial Assessments Act, 6 & 7 *W. 4. c. 97.* Therefore the County Court Judge took a wrong guide for ascertaining the value.

Secondly. Is this a case for prohibition? The rule as

(a) *Ante*, p. 503.

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to prohibition is nowhere better stated than by *Patterson J.*, delivering the judgment of the Court in *Thompson v. Ingham (a)*. After stating that the point whether the title was in question must arise upon the evidence, and as soon as it appeared that it was in question the jurisdiction of the County Court ceased, he said, "The Judge must, of necessity, determine that point for the time, because on it depends whether he hears the case on the merits. Is then his determination conclusive? We think that it is not. The objection is analogous to a plea to the jurisdiction in other Courts, which is indeed determined in the first instance by the Court in which it is pleaded, but is subject to a writ of error." He proceeded to say that as the County Court Act gives no writ of error or appeal, the question whether the County Court had exceeded its jurisdiction must be open to the superior Courts on motion for a prohibition. In the present case, the question of fact being whether the value exceeded 20*l.*, I think the case is one for prohibition; and this is consistent with *In re Brown v. Cocking (b)*, where this Court refused to interfere with the decision of the County Court Judge upon conflicting evidence. Though his decision in such a case is not conclusive, yet, for practical purposes, a strong and peculiar case must be made out to justify us in reversing it and coming to the conclusion that he was wrong. To that extent I agree with *In re Brown v. Cocking*. In the present case the Judge did not decide the value, except in this way, that if he deducted the ground rent the value would be below 20*l.*, but if the ground rent was not deducted the value

(a) 14 Q. B. 710.

(b) *Ante*, p. 503.

would exceed 20*l*. And we may hold, in accordance with *Thompson v. Ingham* (a), that he was wrong in the conclusion to which he came because he applied a wrong test to determine the value.

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LUSH J. In making this rule absolute we follow the ordinary rule of construction, by giving to the language of stat. 30 & 31 *Vict. c. 142. s. 11.* its plain and ordinary meaning. Add to which, the cognate section which immediately follows (sect. 12) gives the County Court jurisdiction to try actions in which the title comes in question "where neither the value of the lands, &c. in dispute, nor the rent payable in respect thereof," exceeds 20*l*. by the year. The argument of Mr. *Oppenheim* requires that we should construe sect. 11 as if the words were "the value of the plaintiff's interest in the lands, &c."; but I agree with my Lord and my brother *Blackburn* that the value intended is that determined by the rent at which the premises would let.

HANNEN J. concurred.

Rule absolute, with costs (b).

(a) 14 Q. B. 710.

(b) See the preceding case.

1868.

Wednesday,
June 10th.

DOBSON against RICHARDSON and others.

*Interrogatories.
Common Law
Procedure
Act, 1854,
17 & 18 Vict.
c. 125. s. 51.
Breach of
agreement.*

1. Per *Cockburn C. J.* In allowing interrogatories under The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125. s. 51.*, a Court of common law is not confined within the same limits as a Court of equity on a bill of discovery.

2. In an action for breach of an agreement to deliver up bills of exchange of a certain Company, the Court allowed the defendant to administer interrogatories to the plaintiff as to the solvency of the Company and the amount of damage which he had sustained by reason of the non-delivery of the bills.

THIS action was brought to recover damages for the breach of an agreement by the defendants to deliver up to the plaintiff bills of exchange to the amount of 15,000*l.* of *The Railway Finance Company, Limited.*

The defendants pleaded payment into Court of 1*s.* in satisfaction of any damages the plaintiff might have sustained by reason of the non-delivery of the bills of exchange.

On the 3rd *June*, *Smith J.* made an order that the defendants be at liberty to deliver the following interrogatories for the examination of the plaintiff:—

“(1.) Is it not the fact that the said *Railway Finance Company, Limited*, at the time of the making of the said agreement, was wholly insolvent? And has not the said Company since then continually been, and is it not now, insolvent? And is it not a fact that its finances were and are in such a state that the creditors thereof will never receive any dividend upon or in respect of their claims?

“(2.) Is it not a fact that if the bills mentioned in the said agreement had been delivered up to you in accordance with such agreement you could not and would not

have received any money whatever from the said *Railway Finance Company Limited*, upon or in respect of the same? And would not the said bills have then been, and are they not now, valueless? And is it not the fact that by reason of the bills being of no value, or on some other and what account, you have sustained and will sustain no actual damage by reason of the non-delivery of the said bills? If you have sustained or will sustain any damage, state the nature of such damage, how and in what manner you have been or will be so damnified.

“(3.) Are you a debtor to the said *Railway Finance Company (Limited)* to any, and if any what, amount?”

Murphy moved to rescind the order of *Smith J.*—The defendants by their interrogatories ask whether the sum which they have paid into Court is not enough. In a bill of discovery a Court of equity would not allow these interrogatories. [*Cockburn C. J.* We are not confined within the same limits as a Court of equity; interrogatories under The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125. s. 51.*, are adapted to a concise system of pleading in respect of the statement of the ground of action and the defence, which is different from a bill and answer in Courts of equity and indeed every other system: we supplement the pleadings by interrogatories and answers, and we ought not to be niggard in requiring information to be given so as to enable both parties to understand what they go down to try.] In *Jourdain v. Palmer (a)*, which was an action for breach of an agreement to pay the stamp duty on letters patent, whereby they became void and the plaintiff lost the profits which he would have derived from working the patent,

(a) 4 *H. & C.* 171.

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DOBSON
v.
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1868. the Court refused to allow the defendant to administer

DOBSON interrogatories to the plaintiff for the purpose of shewing
v. that the letters patent were of no value. *Wright v.*
RICHARDSON. *Goodlake* (a) was cited in that case in support of the
interrogatories, but *Channell B.*, p. 175, distinguished it
on the ground that it was an action of tort. [*Lush J.*
In *Jourdain v. Palmer* (b) the interrogatories were
refused on the ground that they were only relevant for
the purpose of taking an account between the parties.
Cockburn C. J. These interrogatories ask what are the
heads of the damage which the plaintiff has sustained;
if the defendants could get particulars of the damage
we will not drive them back to that step. I should
always allow interrogatories when *ex æquo et bono* the
questions ought to be answered.] At any rate the 3rd
interrogatory ought not to be allowed. It does not
relate to any part of the defendants' case. The learned
Judge settled the interrogatories, and the objection to
this one was not particularly pointed out. [*Cockburn*
C. J. Then out of respect to the order of the Judge we
ought not to disallow it.]

PER CURIAM. (COCKBURN C. J., LUSH and HANNEN JJ.)

Rule refused.

(a) 3 *H. & C.* 540.

(b) 4 *H. & C.* 171.

[1869.]

IN THE EXCHEQUER CHAMBER.

REDHEAD *against* The MIDLAND Railway
Company.[Monday,
May 10th,
1869.]

Railway Companies who undertake to carry passengers for hire, although bound to use the utmost care, skill and vigilance in every thing that concerns the safety of the passengers, do not *warrant* the roadworthiness of the carriages they employ, and consequently are not responsible for an accident to a passenger arising from a latent defect in the wheel of one of their carriages, such as no care or skill could detect. By the Exchequer Chamber, affirming the judgment of the Queen's Bench.

*Railway
Company.
Carrier of
passengers
for hire.
Roadworthi-
ness.
Implied
warranty.*

THIS was an appeal, brought in the form of a special case, against the judgment for the defendants given by the Queen's Bench. (See the proceedings in the Court below, 8 *B. & S.* 371.)

The case was heard *November* 26 and 27, 1868: before KELLY C. B., WILLES, BYLES, KEATING and SMITH JJ., and BRAMWELL and CHANNELL BB.

Manisty (*Crompton* with him), for the plaintiff.—The question involved in this case is one of great general importance, namely, whether the carrier of *passengers*, although not an insurer, does not warrant his carriage to be *de facto* "roadworthy," or, as the phrase is, "fit for the intended purpose," and consequently is liable for injury to a passenger irrespective of any question of knowledge or negligence. The affirmative appears both by the *English* and *American* law. As to the former the authorities, several of which were cited in the Court

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below, are:—*Chitty Contr.* 418, 8th ed.; *Parkinson v. Lee* (a); *Lyon v. Mells* (b); *Lewis v. Peake* (c); *Israel v. Clark* (d); *Jones v. Bright* (e); *Bluett v. Osborne* (f); *Bremner v. Williams* (g); *Sharp v. Grey* (h); *Brown v. Edgington* (i); *Shepherd v. Pybus* (j); *Benett v. The Peninsular and Oriental Steam-Boat Company* (k); *Biggs v. Parkinson* (l); *Jones v. Just* (m); *Burns v. The Cork and Bandon Railway Company* (n). [*Byles J.* referred to *Chanter v. Hopkins* (o).]

After much doubt had been entertained for many years in *America* the question was settled by the following decisions:—*Alden v. The New York Central Railroad Company* (p), *M'Paddon v. New York Central Railroad* (q), *Warner v. The Erie Railway Company* (r).

Kemplay (*Aspinall* with him), for the defendants.—It must be conceded that this question is extremely perplexing, but the decision of the Court below was right, as appears by the following authorities, many of which were then referred to:—*Story on Bailments*, 565, 580, 7th ed.; *Smith Mercantile Law*, 282, 7th ed.; *Amies v. Stevens* (s); *Bluett v. Osborne* (f); *Aston v. Heaven* (t);

(a) 2 *East* 314.(c) 7 *Taunt.* 153.(e) 5 *Bing.* 533; 3 *M. & P.* 155.(g) 1 *C. & P.* 414.(h) 9 *Bing.* 457; 2 *M. & Sc.* 620.(i) 2 *M. & G.* 279; 2 *Scott N. R.* 496.(j) 3 *M. & G.* 868; 4 *Scott N. R.* 434.(k) 6 *C. B.* 775.(m) *Ante*, p. 141.(o) 4 *M. & W.* 399.(q) 47 *Barbour* 247. 252.(s) 1 *Str.* 128.(b) 5 *East* 428.(d) 4 *Esp.* 259.(f) 1 *Stark.* 384.(l) 7 *H. & N.* 955.(n) 13 *Ir. C. L. Rep.* 543.(p) 12 *Smith* 102.(r) 49 *Barbour* 558.(t) 2 *Esp.* 533.

Christie v. Griggs (a); *Crofts v. Waterhouse* (b); *Becket v. Whitehaven Railway Company* (c); *Grote v. The Chester and Holyhead Railway Company* (d); *Manser v. The Eastern Counties Railway Company* (e); *Burges v. Wickham* (f); *Stokes v. The Eastern Counties Railway Company* (g); *Ford v. The South Eastern Railway Company* (h); *Buxton v. The North Eastern Railway Company* (i).

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The following *American* cases are at variance with those cited by the other side:—*Bowen v. The New York Central Railroad Company* (j), *Hegeman v. Western Railroad Corporation* (k).

Manisty, in reply.

Cur. adv. vult.

SMITH J. now delivered the judgment of the Court.

In this case the plaintiff, a passenger for hire on the defendants' railway, suffered an injury in consequence of the carriage in which he travelled getting off the line and upsetting; the accident was caused by the breaking of the tyre of one of the wheels of the carriage owing to a latent defect in the tyre which was not attributable to any fault on the part of the manufacturer and could not be detected previously to the breaking.

Does an action lie against the Company under these circumstances?

This question involves the consideration of the true nature of the contract made between a passenger and a general carrier of passengers for hire.

(a) 2 *Campb.* 79.

(c) 4 *H. & N.* 730.

(e) 3 *L. T. N. S.* 585.

(g) 2 *F. & F.* 691.

(i) 37 *L. J. Q. B.* 258.; *L. R.* 3 *Q. B.* 549.

(j) 4 *Smith* 408.

(b) 3 *Bing.* 319; 11 *Moo.* 133.

(d) 2 *Exch.* 251.

(f) 3 *B. & S.* 669.

(h) 2 *F. & F.* 730.

(k) 3 *Kernan* 1.

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It is obvious that for the plaintiff on this state of facts to succeed in this action he must establish either that there is a warranty by way of insurance on the part of the carrier to convey the passenger safely to his journey's end, or, as his learned counsel mainly insisted, a warranty that the carriage in which he travels should be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril although those defects were such that no skill, care or foresight could have detected their existence.

We are of opinion, after consideration of the authorities, that there is no such contract either of general or limited warranty and insurance entered into by the carrier of passengers, and that the contract of such a carrier and the obligation undertaken by him are to take due care (including in that term the use of skill and foresight) to carry the passenger safely. It of course follows that the absence of such care, in other words negligence, would alone be a breach of this contract, and as the facts of this case do not disclose such a breach, and on the contrary negative any want of skill, care or foresight, we think the plaintiff has failed to sustain his action and that the judgment of the Court below in favour of the defendants ought to be affirmed.

The law of *England* has from the earliest times established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed the responsibility of the carrier to re-deliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed and is so universally known that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm or the common

law declared long ago that carriers of goods should be so liable, it would not have been competent for the Judges in the present day to have imported such a liability into their contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiff to do in the case of carriers of passengers.

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The liability of the common carrier of goods attached upon the particular bailment of the goods to him in his capacity of common carrier, and the rules which govern the rights of bailors and bailees of things are of course applicable only to things capable of bailment.

The law and the reasons for it in the case of bailments to carriers are found in the great judgment of *Holt* C. J. in *Coggs v. Bernard* (a), and are thus stated, "As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c. which case of a master of a ship was first adjudged 26 *Car.* 2 (b) in the case of *Mors v. Slew* (c). The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politick

(a) 2 *Ld. Raym.* 909. 917; 1 *Smith L. C.* 177, 6th ed.

(b) This should be 24 & 25 *Car.* 2.

(c) *T. Raym.* 220; *S. C. nom. Morse v. Shue*, 1 *Ventr.* 190. 238.

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establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing ; for else these carriers might have an opportunity of undoing all persons, that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point." The same law is found in numerous text books (some of which are referred to in the judgments of my brothers *Mellor* and *Lush* in their judgments below (a)), and has been acted on for centuries in the case of carriers of goods.

The Court is now asked to declare the same law to be applicable to contracts to carry passengers. The learned counsel for the plaintiff felt the difficulty of the attempt to apply the entire liability of the carrier of goods to the carrier of passengers, but he contended for and mainly relied on the proposition that there was at least a warranty that the carriage in which the passenger travelled was roadworthy, and that the liability of the carriers of goods in this respect ought to be imported into the contract with the passenger.

But first it is extremely doubtful whether such warranty can be predicated to exist in the contract of the common carrier of goods. His obligation is to carry and re-deliver the goods in safety whatever happens ; in the words of Lord *Holt* "he is bound to answer for the goods at all events." Again, "The law charges this person thus intrusted to carry goods against all events but acts of God and the enemies of the King:" and this broad obligation renders it unnecessary to import into

(a) 8 B. & S. 371. 376. 381-2.

the contract a special warranty of the roadworthiness of the vehicle, for if the goods are safely carried and re-delivered it would be immaterial whether the carriage was roadworthy or not, and if the goods are lost or damaged the carrier is liable on his broad obligation to be answerable "at all events;" and it is unnecessary to inquire how that loss or damage arose.

But, however that may be, it is difficult to see upon what principle the contract of the carrier of goods, which on the hypothesis does not apply in its entirety to carriers of passengers, is to be dissected and a particular part of it severed and attached to what, on the hypothesis, is another and different contract. It was contended that the reason which made it the policy of the law to impose the wider obligation on the carriers of goods applied with equal force to impose the limited warranty of the soundness of the carriage in favour of the passenger. The reason suggested was, as we understood it, that a passenger when placed in a carriage was as helpless as a bale of goods, and therefore entitled to have for his personal safety a warranty that the carriage was sound, but this is not the reason or anything like the reason given by Lord *Holt* for the liability of the carrier of goods. The argument founded on this reason however would obviously carry the liability of the carrier far beyond the limited warranty of the roadworthiness of the carriage in which the passenger happened to travel. His safety is no doubt dependent on the soundness of the carriage in which he travels, but in the case of a passenger on a railway it is no less dependent on the roadworthiness of the other carriages in the same train and of the engine drawing them, on the soundness of the rails, of the points, of the signals, of the masonry, in

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Court Judge put the right construction on sect. 11 of stat. 30 & 31 *Vict. c. 142.*, and I think he did. The meaning of the phrase "the rent payable in respect thereof" is a question of law. Does it mean the rent payable by the defendant to the plaintiff, or the rent payable to the defendant by his subtenants? Clearly it means the rent as between the litigant parties. In order to give the County Court jurisdiction neither the value nor the rent by the year must exceed 20%. If the rent payable by the defendant to the plaintiff does not exceed 20%, and the defendant gets more than 20% by subletting, that may be a good element to determine the value; but the Judge was right in his construction as to the rent.

Secondly. Is the decision of the County Court Judge on the question of value liable to be reviewed by prohibition? There was evidence on both sides, and it is impossible to say that he was not bound to form his decision on it, for if he was of opinion that the value exceeded 20% he had no jurisdiction to proceed. Then, there being evidence to justify his decision, it is conclusive. Prohibition does not issue unless the Judge of the County Court has done something which he was not authorized by the statute to do.

HANNEN J. The phrase in stat 30 & 31 *Vict. c. 142. s. 11.*, "the rent payable," means the rent payable between the litigant parties, not the rent payable by any sublessee to any sublessor. The argument that the statute intended to make the rent conclusive as to value cannot extend to the rent payable by a sublessee. If the rent as between the parties does not

exceed 20*l.* the next inquiry is as to the annual value of the premises. The fact that some other person is paying more rent than 20*l.* is strong evidence that the annual value exceeds 20*l.*, but is not conclusive. Whether the real value exceeded 20*l.* or not the case equally serves to illustrate the discrepancy between rent and value, for the evidence was that the rent paid to the lessee was enhanced by the fact that some portions of the premises were let by him furnished, which would rebut the presumption that that rent represented the annual value.

As to the other point, I have some hesitation in concurring in the judgment that we are absolutely concluded by the decision of the Judge on conflicting evidence; but in a case like the present, where the evidence is so nicely balanced, we ought not to interfere.

Rule discharged, without costs (a).

(a) See the next case.

In the matter of a Plaintiff between ELSTONE
against ROSE.

1868.

In re
BROWN
v.
COOKING.

[Thursday,
November
12th.]

By The County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 11., "All actions of ejectment where neither the value of the lands, &c., nor the rent payable in respect thereof, shall exceed the sum of 20*l.* by the year," may be brought in the County Court. In ejectment against the occupier by the assignee of a term subject to a ground rent, the County Court Judge was of opinion that by deducting the ground rent the annual value of the premises was reduced below 20*l.*, and therefore he had jurisdiction. Held,
1. That the value intended in sect. 11 is the marketable value of which the rent paid by the tenant to the immediate landlord is, in the absence of exceptional circumstances, a fair criterion.
2. That, the County Court Judge having adopted an erroneous test of value, this Court would grant prohibition.

County Courts
Act, 1867,
30 & 31 Vict.
c. 142. s. 11.
Ejectment.
Annual value.
Jurisdiction of
County Court.
Prohibition.

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Exchequer Chamber, says, "The common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property;" *The Lancaster Canal Company v. Parnaby* (a). The liability in that case was not put in any degree upon a warranty that the canal shall be free from perilous defects, but upon the rational obligation to use due care that it shall be so.

The common law with regard to carriers of goods and innkeepers stands, as I have said, on its own special grounds. But it was found so stringent, not to say unjust, in the liabilities it imposed on persons carrying on those trades, that the Legislature found it necessary in both cases to modify its stringency.

It will now be necessary to examine the leading authorities cited during the argument.

The counsel for the plaintiff in the first place referred to some of the cases in which it has been held that in contracts for the supply of goods for a particular purpose there is an implied warranty that the goods supplied shall be reasonably fit for that purpose. *Biggs v. Parkinson* (b) is a case of that class. But the agreement to sell and supply goods for a price which may be assumed to represent their value is a contract of a different nature from a contract to carry, and has essentially different incidents attaching to it. Indeed the learned counsel did not cite these cases as directly governing the present. Even in the cases of contracts

(a) 11 A. & E. 223. 243.

(b) 7 H. & N. 955.

to supply goods it may be a question, on which it is not now necessary to express an opinion, how far and to what extent the vendor would be liable to the vendee in the case of a latent defect of the kind existing in the present case, which no skill or care could prevent or detect, that is to say, where an article is supplied which has been manufactured and tested in the best and most careful manner, so as to be turned out as perfect as in the nature of things it could be. It is clear that if the manufacturer is liable for such an inevitable and undiscoverable defect, he can never sell what he makes without the risk of an action attaching itself to every contract he enters into—without in fact becoming an insurer, unless he expressly limits his liability.

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In cases of express warranties the compact of the parties is to be gathered from the words they use in making them. When warranties are expressly made the parties themselves may guard against excessive liability by any exceptions they please, and in those implied by law the law itself must take care to keep them within the boundaries of reason and justice, so as not to impose impracticable obligations.

It is now proposed to consider the authorities relied on as having a direct bearing on the question before us.

The case which the plaintiff's counsel relied on as the strongest in his favour is *Sharp v. Grey* (a). But that case when examined furnishes no sufficient authority for the extensive liability which the plaintiff seeks to impose on the defendants. There the plaintiff was injured by an accident caused by the breaking of the axletree of a stage coach. The defect might have been discovered if a certain examination had taken place, and

(a) 9 Bing. 457; 2 M. & Sc. 620.

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it was made a question of fact at the trial whether it would have been prudent or not to make that examination. *Tindal* C. J., who tried the cause, is reported to have directed the jury to consider "whether there had been, on the part of the defendant, that degree of vigilance which was required by his engagement to carry the plaintiff safely." Now if the learned Chief Justice had supposed there was an absolute warranty of roadworthiness, this direction could not have been given, as it would then have been immaterial whether the defendant had used vigilance or not, and the degree of vigilance would have been an utterly immaterial consideration. The jury having found on this direction for the plaintiff, a motion was made in the absence of *Tindal* C. J. for a new trial. Two of the learned Judges in refusing the rule, *Gaselee* and *Bosanquet* JJ., are certainly reported to have used expressions which seem to indicate that they thought the defendant bound to supply a roadworthy vehicle. *Park* J. uses language which, as reported, is ambiguous. But the judgment of *Alderson* J. is distinctly opposed to the notion of a warranty against latent and undiscoverable defects. He says, p. 45, "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered by investigation." We have referred somewhat fully to this case because it was put forward as the strongest authority in support of the plaintiff's claim which can be found in the *English* Courts, and because it was relied on by the Judges of the Court of Appeal in *New York* in a decision which will be afterwards referred to. But the case when examined furnishes no sufficient authority for the unlimited warranty now

contended for. The facts do not raise the point for decision, and the authority of *Tindal* C. J. and *Alderson* J. is against the plaintiff.

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The dictum of *Best* C. J. in *Bremner* v. *Williams* (a) was not necessary to the decision of the case. The ruling of Lord *Ellenborough* in *Israel* v. *Clark* (b) was also relied on. Of these two last authorities *Blackburn* J., in his judgment below (c), said, "These are, it is true, only *Nisi prius* decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the Judge was rightly understood." We find also that *Best* C. J. makes observations in the opposite sense in the case of *Crofts* v. *Waterhouse* (d).

These cases are really the only *English* authorities which afford any support at all to the plaintiff's view, for the interpretation reported to have been given by *Cresswell* J. in *Benett* v. *The Peninsular and Oriental Steam-Boat Company* (e) of the case of *Sharp* v. *Grey* (f) was only an observation made during an argument when it was cited as incidentally bearing on the question then before the Court, and cannot be relied on as authority.

On the other hand, there is not only the plain distinction between the liabilities of the carriers of goods and of passengers constantly referred to by text writers and Judges as well known and settled law, but numerous cases have been decided on grounds entirely at variance with the supposition that there existed contemporaneously with them the liability by way of

(a) 1 C. & P. 414. 416.

(b) 4 Esp. 259.

(c) 8 B. & S. 401.

(d) 3 Bing. 319; 11 Moo. 133.

(e) 6 C. B. 775. 782.

(f) 9 Bing. 457; 2 M. & Sc. 620.

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warranty. In *Aston v. Heaven* (a), which was the case of injury to a passenger, *Eyre C. J.*, after carefully pointing out the law as to the liability of carriers of goods to make good all losses except those happening from the act of God or the King's enemies, and the reasons for it, says, p. 534, "I am of opinion the cases of losses of goods by carriers and the present are totally unlike." Again, "There is no such rule in the case of the carriage of persons; this action stands on the ground of negligence alone." In *Christie v. Griggs* (b) Sir *James Mansfield* said, "There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was liable at all events. But he did not warrant the safety of the passengers. His undertaking, as to them went no farther than this, that as far as human care and foresight could go, he would provide for their safe conveyance." In *Crofts v. Waterhouse* (c) the observations attributed to *Best C. J.* clearly shew that he did not think there was any warranty on the part of carriers of passengers, and *Park J.*, in the same case, p. 321, says, "A carrier of goods is liable in all events * * *; a carrier of passengers is only liable for negligence."

But, besides the observations of individual Judges to shew what has hitherto been understood to be the law, there is the long series of important cases involving costly and protracted trials, in which, by common consent, the liability of carriers of passengers has been based upon the duty to take due care, and not upon a warranty.

In *Grote v. The Chester and Holyhead Railway Com-*

(a) 2 *Esp.* 533.

(b) 2 *Camp.* 79. 81.

(c) 3 *Bing.* 319; 11 *Moo.* 133.

pany (a), where the accident arose from the breaking down of one of the bridges of the railway, the case turned on what would or would not be negligence for which the Company were answerable. *Parke* B. says, p. 254, "It seems to me that they (the Company) would still be liable for the accident, unless he (the engineer) also used due and reasonable care and employed proper materials in the work." There is no trace in the report that it ever occurred to the Court to suppose there was any warranty of the safety of the bridge.

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In a case tried before *Erle* C. J., *Ford v. The London and South Western Railway* (b), the plaintiff was injured by the tender of the train being thrown off the line, and one of the causes was alleged to be the defective tyre of one of the wheels of the tender, *Erle* C. J. in his direction told the jury, p. 782, "The action is grounded on negligence. Negligence is not to be *defined* because it involves some enquiry as to the *degree* of care required, and that is the degree which the jury think *is reasonably* to be required from the parties, considering all the circumstances. The railway Company is bound to take *reasonable* care; to use the *best precautions in known practical use*, for securing the safety and convenience of their passengers." There the defect was in the tyre of a wheel of the tender of the train by which the plaintiff travelled. And no suggestion that a warranty of its soundness existed was made throughout the case.

But a case still more directly bearing upon the present point was tried before *Cockburn* C. J.; *Stokes v. The Eastern Counties Railway Company* (c). There the accident happened in consequence of the breaking of the tyre of the near wheel of the engine. The tyre broke

(a) 2 *Exch.* 251.(b) 2 *F. & F.* 730.(c) 2 *F. & F.* 691.

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from a latent flaw in the welding. The trial lasted six days, and the questions mainly were, whether the flaw was not visible, and whether by the exercise of care it might not have been detected. The Lord Chief Justice commences a full direction to the jury by saying, "The question is, whether the breaking of the tyre resulted from any negligence in the defendants or their servants for which they are responsible." The latent defect in the tyre was admitted to be the cause of the accident; but the jury having found in answer to specific questions that there was no evidence the tyre was negligently welded, and that the defect had not become visible, and having in other respects negatived negligence, the verdict was entered for the defendants. The facts of that case appear to be exactly like the present, except that in this case the defective tyre was in the wheel of the carriage, and there in the wheel of the engine. But for the reasons already given it can never be that a warranty can exist as to the carriage but not as to the engine drawing it. Thus then it is plain a trial of six days took place on issues which were utterly immaterial if a warranty ought to have been implied, and there the learned Chief Justice, and the parties themselves, seem to have been utterly unconscious of the contract which was really existing, if the plaintiff in this case is right the warranty, as an obligation implied by law, must have existed at the time of these trials, if it exists now; and surely it is strong to shew that no such rule does form part of the common law that it was not then recognised and declared.

The learned counsel for the plaintiff insisted that a carrier by sea is bound to have his ship seaworthy. Undoubtedly the carrier of goods by sea, like the carrier

of goods by land, is bound to carry safely and is responsible for all losses, however caused, whether by the unseaworthiness of the ship or otherwise, and it does not appear to be material to inquire, when he is subject to this large obligation, whether he is also subject to a less one. In the case of *Lyon v. Mells* (a) it was no doubt stated by the Court that the carrier of goods is bound to have a seaworthy ship, but this only as part of his general liability. It is well to observe that *Holroyd* who argued for the plaintiff, and *Gaselee* for the defendant, both state the liability of the carrier in all its breadth, viz., a liability for all losses however happening except by the act of God or the King's enemies. This case therefore falls within the class of decisions relating to the liability of the carriers of goods. No case has been found where an absolute warranty of the seaworthiness of the ship in the case of passengers has arisen, and it affords a strong ground for presuming that no such liability exists, that in this maritime nation no passenger has ever founded an action upon it.

The case of *Burns v. The Cork and Bandon Railway Company* (b), in the Irish Court of Common Pleas, certainly does not support the plaintiff's view of the law. The Court say there the averments in the defendant's plea are all consistent with gross and culpable negligence, and on that ground give judgment for the plaintiff. The judgment plainly shews that the Court do not mean to declare there is an absolute undertaking that the vehicle shall be free from defects. The language is, "free from defects as far as human care and foresight can provide, and perfectly roadworthy." The Court refer with approbation to the language of Sir James

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(a) 5 East 428.

(b) 13 Ir. Com. Law Rep. 543.

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Mansfield and *Alderson* J., which helps to explain that they were disposed to adopt the views of those learned Judges and to place the liability not on a warranty but on the obligation to exercise care and foresight.

It now remains to consider the *American* decisions on the subject. They have not been uniform. The judgment of Mr. Justice *Hubbard* in *Ingalls v. Bills* (a), cited at length by my brother *Mellor* in his judgment below (b), is opposed to the notion of a warranty. Decisions however were cited before us by Mr. *Manisty* from the Courts of the State of *New York*, having a contrary tendency, to shew us that in that State the law had been declared in favour of annexing a warranty to the contract. The most important of these cases is *Alden v. The New York Central Railroad Company* (c) in the Court of Appeals of the State of *New York*. That was the case of an accident caused by a defect in an axletree, and the reasons given by *Gould* J. for the decision are not satisfactory to our minds. The learned Judge seems to assume there was no negligence shewn on the part of the Company. He cites the case of *Sharp v. Grey* (d) in the Court of Common Pleas here, and he interprets that case to determine that the carrier warrants the roadworthiness of his coach. But if the view of the case of *Sharp v. Grey* taken in the early part of this judgment is correct the learned Judge gave too great weight to it. *Gould* J. then, after having given the rule as he supposed it to be laid down in *Sharp v. Grey*, observes, "And though this may seem a hard rule it is probably the best that can be laid down, since it is plain and easy of application, and when once

(a) 9 *Metc.* 1—15.(b) 8 *B. & S.* 393-4.(c) 12 *Smith* 102.(d) 9 *Bing.* 457; 2 *M. & Sc.* 620.

established is distinct notice to all parties of their duties and liabilities." With deference to the learned Judge these reasons founded on the convenience of the arrangement are scarcely sufficient to warrant the introduction of onerous obligations into the contracts of parties, and the terms in which the judgment is given rather lead to the conclusion that the learned Judge was conscious that he was annexing to the contract of the carrier of passengers what had not hitherto been understood to form part of it. The *English* Courts are desirous to treat the *American* decisions with great respect, but as their authority here must mainly depend on the reasons on which they are founded we have felt bound to examine the reasons on which this decision was based, with the result which has been already stated.

Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given.

We have already gone fully into the reasons for holding that in our opinion the warranty contended for in this case is not so founded.

On the other hand, it seems to be perfectly reasonable and just to hold that the obligation well known to the law, and which because of its reasonableness and accordance with what men perceive to be fair and right has been found applicable to an infinite variety of cases in the business of life, viz., the obligation to take due care, should be attached to this contract. We do not attempt to define, nor is it necessary to do so, all the liabilities which the obligation to take due care imposes

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on the carriers of passengers. Nor is it necessary, inasmuch as the case negatives any fault on the part of the manufacturer, to determine to what extent and under what circumstances they may be liable for the want of care on the part of those they employ to construct works, or to make or furnish the carriages and other things they use. See on this point *Grote v. The Chester and Holyhead Railway Company* (a). "Due care" however undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed or however rigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery they are obliged to use, which no human skill or care could either have prevented or detected.

In the result we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and, so far as it rests on principle, fails in reason. Consequently the judgment of the Court of Queen's Bench in favour of the defendants will be affirmed.

Judgment affirmed.

(a) 2 *Exch.* 251.

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BAMFORD and another *against* MOSES HODGETTS
 CLEWES and HERBERT HENRY CLEWES.

Wednesday,
 June 10th.

Declaration for goods sold and delivered. Plea on equitable grounds : a composition deed ; with an averment that the defendants were ready and willing to pay to the plaintiffs the first instalment of the composition, but the plaintiffs refused to accept it, and discharged the defendants from paying or tendering it.

1. Held good, without payment of money into Court ; and
2. *Semble*, per *Lush J.*, good as a legal plea.

Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192. Composition deed. Plea. Readiness and willingness to pay instalment.

DECLARATION for goods sold and delivered.

Plea by way of defence on equitable grounds. A composition deed, made between the defendants copartners of the first part, *Thomas Matthew Clewes* of the second part and the several creditors of the defendants of the third part ; by which ; after reciting that the defendants were unable to pay their creditors 20s. in the pound on their respective debts, and had proposed to them to pay a composition of 10s. in the pound by four instalments of 2s. 6d. each at one month, five months, nine months and thirteen months after the date of the deed in full satisfaction and discharge of the several and respective claims and demands on them, the last of such instalments to be secured as thereafter mentioned : IT WAS WITNESSED that, in consideration of the premises, the several creditors of the defendants, being a majority in number representing three fourths in value of the creditors whose debts respectively amounted to 10% and upwards, had agreed to accept and take such composition in satisfaction and discharge ; and in consideration and on payment thereof, or whenever thereafter called upon for the purpose, did thereby severally undertake and agree to execute to the defen-

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dants a release of their several and respective claims; "and do further agree not to sue or molest" the defendants "for any claim that they or any of them have against" them "or either of them unless or until default be made by" the defendants "in the payment of the said composition instalments at the times and in the manner aforesaid." And it was further agreed that if any creditors should sue or molest the defendants or either of them contrary to the last mentioned agreement those presents might be pleaded in bar of the action. . . . Provided that those presents were intended to operate as a deed within the provisions of The Bankruptcy Act, 1861, &c. Covenant by the defendants to pay the instalments, and by *Thomas Matthew Clewes* that the defendants would pay the fourth instalment. In witness &c. Averment. That the requisitions of The Bankruptcy Act, 1861, had been observed, and that all conditions had been performed &c., and that the defendants were ready and willing to pay to the plaintiffs the first instalment of the composition according to the tenor and effect of the deed, but the plaintiffs refused to accept the same, and exonerated and discharged the defendants from paying or tendering it, and wholly and absolutely refused to consent to or approve of or become parties to the deed.

Demurrer, and joinder.

Day, for the defendants.—The deed is a discharge from the debt, and the plea founded on it excusing payment or tender of the composition by reason of the refusal of the plaintiffs to accept it is good. In *In re Sullivan, ex parte Sullivan* (a), there was a refusal on the part of a creditor to take the first instalment when

(a) 36 *L. J. Bank.* 1.

it was tendered, and *Turner* L. J. said, p. 4, "This amounted on his part clearly to a refusal to abide by the deed. Therefore I think that dispenses with the payment or tender of the other instalments until the creditor had notified a change of intention on his part."

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Griffiths, for the plaintiffs.—Payment or tender of the composition or something equivalent is the consideration for the release in the deed; therefore the plea is not good without bringing money into Court. [He cited *Boyd v. Hind*, on appeal (a), per *Williams* J., delivering the judgment of the Court.] [Cockburn C. J. This is not an ordinary plea of tender: the question is, whether the position of the debtors as established by the deed is taken away from them by reason of the non-payment or non-tender of the composition. If the defendants are entitled to immunity from an action to recover the debt there can be no necessity to bring money into Court.] The defendants must be always ready to pay each instalment at and after the day on which it becomes payable. [Cockburn C. J. That is if the plaintiffs, having once refused to accept any instalment, demand it. This is not an action for an instalment. *Lush* J. The ordinary plea of tender is to get rid of damages. This is a plea of performance getting rid of the claim altogether. I do not see why it is not a good legal plea; 2 *Shepp. Touchst.*, by *Preston*, 7th ed. p. 385.] If the plea had averred that the defendants were always ready and willing the plaintiffs might have traversed the averment.

Day, in reply.—It would have been informal to accompany this plea by bringing money into Court. An alle-

(a) 1 H. & N. 938. 947.

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gation of readiness and willingness to pay would have been supported by evidence of a subsequent tender ; but the necessity of a tender was waived.

COCKBURN C. J. We may decide this case on the particular terms of the agreement in the deed, which are that the creditors will not sue the defendants for any claim they may have against them "unless or until default (a) be made" by the defendants "in the payment of the said composition instalments at the times and in the manner aforesaid." I must assume that the defendants did tender the first instalment or make an offer equivalent to a tender and that the plaintiffs refused to accept it ; therefore there was no default in respect of that instalment ; and to make out a subsequent default it should be shewn that the plaintiffs were afterwards minded to receive an instalment and that the defendants failed to pay it. But there was no subsequent demand : and therefore there was no default to disentitle the defendants to plead the deed as a bar to the action.

LUSH J. This action is brought for the original debt, and the defendants seek to exonerate themselves from it by pleading the deed which is to be a bar to any claim against them until they make default in payment of the composition ; they shew that they did not make default ; therefore the plea is good.

HANNEN J. concurred.

Judgment for the defendants (b).

(a) See *Albert v. The Grosvenor Investment Company, Limited*, 8 B. & S. 664.

(b) See the next case.

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HART and another *against* SMITH.[Friday,
November
20th.]

*Bankruptcy
Act, 1861,
24 & 25 Vict.
c. 134. s. 192.
Composition
deed.
Release.
Pleading.
Payment or
tender of
composition.
Benefit of
creditors.*

Declaration by drawees against acceptor of bills of exchange. Plea. A composition deed made between the defendant of the first part, a trustee of the second part, and all the creditors at the date of a recited indenture of the third part, by which, after reciting the prior deed, for which the pleaded deed was to be substituted, as agreed by all the parties to it, the defendant covenanted with the trustee and creditors respectively that if the deed was duly registered under The Bankruptcy Act, 1861, he would pay to each of the creditors a composition of 2s. in the pound by two instalments, on &c.: and it was agreed that certain premises and effects of the defendant assigned by the recited indenture should be held by the trustee in trust for the defendant until default in payment of the composition. Provided that if default should be made the trustee should sell and apply the proceeds (inter alia) "in payment rateably of the debts due to the said creditors respectively" by the said debtor; the creditors released the defendant from the debts due to them respectively: provided that in case default should be made contrary to the covenant in payment of the composition to the creditors respectively the release should be at an end, "and the creditors shall thenceforth be at liberty to sue for or prove for the full amount of their respective debts," &c.: provided that the deed should not prevent any of the creditors from claiming or realizing any security held by them, or from suing any person other than the debtor liable for payment thereof for the recovery thereof &c. Averment (inter alia) that all things necessary in that behalf having happened and been done the plaintiffs were bound by the deed. Replication on equitable grounds: that the deed was not executed or assented to by the plaintiffs; that when the deed was executed the defendant had available assets for the payment of a much larger composition than 2s. in the pound, that the deed was not bonâ fide executed for the equal benefit of all the creditors, but solely from motives of benevolence and kindness to the defendant, and for his sole and only benefit, and without any just regard to the rights or interests of the other creditors. On demurrer, held,

1. That the deed was an absolute release by each of the creditors of his own debt defeasible on nonpayment of the composition to him; and therefore

(1). The plea was good without alleging payment or tender of the composition to the plaintiffs.

(2). Or without alleging payment or tender of the composition to the other creditors of the defendant.

2. That it was not necessary that the amount of the composition should be brought into Court.

3. Concessum. That the deed was pleadable in bar as a release: and

4. Per Cockburn C. J. and Lush J., the circumstances stated in the replication rendered the deed not a binding deed within sect. 192, *Hannan and Hayes JJ.* assenting on the authority of *In re Cowen, ex parte Foster*, 38 L. J. Bank. 41; *S. C. Ex parte Cowen. In re Cowen*, L. R. 2 Chanc. App. 563.

DECLARATION on ten bills of exchange drawn by the plaintiffs and accepted by the defendant.

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v.
SMITH.

First plea. A composition deed dated the 5th *December*, 1866, between the defendant, the debtor, of the first part, *J. Bowden*, a trustee, of the second part, and all who were at the date of the recited indenture creditors of the debtor of the third part, by which; after reciting that by an indenture dated the 25th *October*, 1866, between the debtor of the first part, *J. Bowden* of the second part, and the creditors of the debtor therein particularly described of the third part, for the consideration therein mentioned the debtor covenanted with *J. Bowden*, and also, as a separate covenant, with each of the creditors, that he would, within six weeks after registration of the indenture in recital, pay to all his creditors a composition of 3*s.* 6*d.* in the pound; and by the same indenture he assigned unto *J. Bowden*, his executors, &c., the leasehold messuage, household furniture, goods, chattels and effects, therein particularly described, for the term, at the rent and under and subject to the covenants and conditions, trusts, intents and purposes in the indenture in recital respectively declared or referred to; that in consequence of difficulties which had arisen in carrying into effect the covenant of the debtor and the trusts declared in and by the in part recited indenture, it had been agreed between all the parties thereto to substitute for the covenants, trusts, powers and provisions contained in the indenture of the 25th *October*, 1866, the covenants, trusts, powers and provisions therein contained; that the debtor had proposed to pay to the creditors a composition of 2*s.* in the pound by the instalments, at the times and in manner thereafter mentioned and secured, and that a majority in number representing three-fourths in value of the creditors whose debts

respectively amounted to 10% and upwards had agreed to accept that composition in full discharge of their several debts and demands, and to execute or in writing assent to or approve of those presents: It was witnessed that in pursuance of the proposal and agreement, and in consideration of the release and stipulations thereafter contained, the debtor did thereby for himself, his heirs, executors and administrators, covenant with the trustee, his executors, administrators and assigns, and as a separate covenant with the creditors respectively, and their respective executors, administrators and assigns, that if those presents should be duly registered under the provisions of The Bankruptcy Act, 1861, he, the debtor, or his executors or administrators, would well and punctually pay to each of the creditors, whether executing or assenting thereto or not, such sums as should in the aggregate be at the rate of 2s. in the pound upon the amount which would have been proveable under an adjudication of bankruptcy against the debtor if he had become and been declared a bankrupt at the date of such registration, by two instalments of 1s. in the pound each upon the amount aforesaid; and one of such instalments should be payable on the 1st *January*, 1867, and the other instalment on the 1st *June* then next following: Provided that the trustee might, in his discretion, require the debt or demand of any creditor to be verified by solemn declaration or otherwise proved as in bankruptcy; and also that creditors holding security upon any part of the property or effects of the debtor should only be entitled to receive the aforesaid composition in respect of the balance of the debts owing to them respectively after deducting the value of the property or effects of the debtor comprised in such

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security. Then followed a declaration of the trusts of the premises assigned by the recited indenture, viz., In trust for the debtor until default in payment of the composition, and after payment to re-assign the trust premises unto the debtor; with a power to sell if default should be made in payment of the composition or any instalment thereof, or in payment of the rent reserved, or in the performance of the covenants in the lease, and to apply the moneys arising from the sale in payment of the rents, &c., and of the costs, charges and expenses of the arrangement between the debtor and his creditors, &c., and the residue in payment rateably of the debts due to the creditors respectively, and to pay the ultimate surplus, if any, unto the debtor. Covenant by the debtor to pay the rent and perform the covenants in the lease until a sale. IT WAS ALSO WITNESSED that in further pursuance of the agreement, and in consideration of the covenants and assignment thereinbefore and the stipulations therein contained, the creditors did thereby for themselves respectively, &c., release and discharge the debtor, his heirs, &c., from the several covenants on the part of the debtor contained in the thereinbefore recited indenture of the 25th *October*, 1866, and from the debts due to the creditors respectively from the debtor, and from all actions, &c. in respect thereof: Provided always, and it was thereby agreed and declared, that in case default should be made contrary to the covenant in that behalf thereinbefore contained in payment of the composition or any instalment thereof to the creditors respectively, or in case before the composition should be fully paid to the creditors respectively the debtor should be adjudicated bankrupt or make or attempt to make any arrangement with the

creditors different to the arrangement thereby provided for, then and in any such case the release therein contained should be thenceforth at an end, and the creditors should thenceforth be at liberty to sue for or prove for the full amount of their respective debts less the amount which might have been received by them on account thereof under those presents or otherwise. Provided always that those presents should not prevent any of the creditors from claiming, retaining or realizing any security then held by them or any of them, or from suing any persons or person other than the debtor liable for the payment of any of the debts for the recovery thereof respectively, less the amount received by them or any of them under those presents, &c. Provided also that those presents were intended to operate as a composition deed executed by a debtor within the 192nd section of The Bankruptcy Act, 1861, and that questions arising thereunder relating thereto or to any of the premises should be decided according to the provisions of that Act with respect to such deeds, and that, so far as such provisions would admit, those presents should enure for the benefit of and be effectual against and binding in all respects upon all persons who would have been entitled to prove under such adjudication of bankruptcy as aforesaid if the same had been made as thereinbefore was mentioned. And it was thereby declared that the trustee was a trustee of the covenants therein contained for the benefit of all the creditors of the debtor, whether such creditors respectively should execute or assent thereto or not, and should hold any moneys recovered thereunder in trust for the creditors entitled thereto. In witness, &c. Averment of compliance with the requisitions of sect. 192

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of The Bankruptcy Act, 1861, and that immediately on the execution of the deed by the defendant possession of all the property comprised therein of which the defendant could give or order possession was given to the trustee; and at the date of the deed recited in the deed thereinbefore set forth and at the making and registration of the deed thereinbefore set forth the plaintiffs were creditors of the defendant in respect of the claim therein pleaded to, and, all things necessary in that behalf having happened and been done, the plaintiffs became and were bound by the deed as if they had been parties thereto and had duly executed the same.

Second plea. That the first plea was true, and that the defendant was always ready and willing to pay the composition, and tendered and offered to the plaintiffs to pay the same to them, according to the deed, at the respective times in the deed appointed for payment thereof, and the plaintiffs refused to accept the same.

Third plea. That the first plea was true, and that the plaintiffs discharged the defendant from tendering the composition and waived such tender, and prevented the defendant from tendering or paying the same.

Third replication to the first plea. That default was made by the defendant contrary to his covenant contained in the deed in that behalf in the payment of the composition to divers and very many of the defendant's creditors mentioned in and within the meaning of the deed (other than the plaintiffs) respectively upon the amounts of their respective debts, being debts within the meaning of the deed, by the instalments, on the days and times and in manner in the deed in that behalf mentioned and provided, and although the days and

times for the payment of the composition to each of the defendant's last mentioned creditors by the instalments aforesaid had elapsed before this suit, yet that the composition still remained unpaid to each of the defendant's last mentioned creditors.

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Fourth replication to the second plea. The same as the third to the first plea, concluding with an averment that the composition still remained unpaid to each of the defendant's last mentioned creditors and the same had never been paid or tendered to each of the last mentioned creditors, or to either of them, by the instalments or in manner in the deed in that behalf mentioned and provided or otherwise.

Fifth replication to the third plea. The same as the fourth to the second plea.

Sixth replication on equitable grounds to the first plea. That the pleaded deed in the first plea mentioned was never executed by the plaintiffs or either of them, nor did they nor did either of them ever assent to or approve of the same, and that the plaintiffs were not nor were either of them parties to, nor did they nor either of them ever assent to or approve of, either of the two agreements mentioned and referred to in the pleaded deed, that is to say, the alleged agreement first therein mentioned and referred to whereby it was alleged to have been agreed between and by all the parties to the pleaded deed to substitute for the covenants, trusts, powers and provisions contained in and expressed by the indenture of the 25th *October*, 1866, mentioned in the pleaded deed, the several covenants, trusts, powers and provisions contained in the pleaded deed, and the alleged agreement in the pleaded deed secondly mentioned and referred to whereby it was alleged that a

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majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards had agreed to accept the composition of 2*s.* in the pound, payable as and secured in manner therein mentioned, in full discharge of their several debts and demands, and to execute or in writing assent to or approve of the pleaded deed. Averment. That at the respective times when the two agreements were made and entered into and assented to and approved as aforesaid, and when the pleaded deed was made and executed and assented to and approved of as aforesaid by the majority of the defendant's creditors as aforesaid, as in the first plea mentioned, the defendant had and was in the possession of available assets sufficient for the payment to the creditors of a much larger composition than 2*s.* in the pound upon the amount of their respective debts; that the two agreements and the pleaded deed were not nor were either of them bonâ fide made or entered into or executed or assented to or approved of by any or either of the parties thereto or by the creditors who assented to or approved of the same, for the equal benefit of all the defendant's creditors mentioned in and within the meaning of the deed. And the same agreements and each of them, and the pleaded deed, were respectively made and entered into and executed and assented to and approved of by the parties thereto and by the majority of the defendant's creditors solely from motives of benevolence and kindness to and for the defendant and for his sole and only benefit, and without any just regard to the rights or interests of the defendant's other creditors, and to give the defendant a release and discharge from his debts and demands on the payment of

the alleged composition of 2s. in the pound upon the amount of their respective debts in the pleaded deed and in the secondly mentioned agreement mentioned. And that the same alleged composition of 2s. in the pound in truth and in fact was only a nominal composition and wholly disproportioned to the assets of the defendant of which he at the times aforesaid was possessed and had, and which could and might and ought to have been and were available towards the payment of the defendant's creditors their debts and demands.

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Seventh replication on equitable grounds to the second plea. That the statements, allegations and facts in the sixth replication on equitable grounds to the first plea are true in substance and in fact, and the plaintiffs repeat the same statements, allegations and facts in this replication; wherefore they refused to accept the alleged tender and offer of payment of the composition.

Eighth replication on equitable grounds to the third plea, after the same preliminary averment as in the seventh replication to the second plea: wherefore the plaintiffs discharged the defendant from tendering the composition and waived the tender.

Demurrer to the first, second and third pleas, and joinder.

Demurrer to the third, fourth, fifth, sixth, seventh and eighth replications, and joinder.

H. James, for the plaintiffs.—The pleas are bad. A composition deed is not binding on non-assenting creditors unless the composition covenanted to be paid has been either paid or tendered not only to the creditor suing but also to all the creditors of the debtor. And, for the same reason, the third, fourth and fifth replica-

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tions are good. In *Fessard v. Mugnier* (a) a plea which contained an averment that the defendant was always ready and willing to pay the composition to the plaintiff as well as a general averment of the performance of all conditions was held bad. *Erle* C. J. said, p. 805, "The plea contains no averment that the composition was paid or tendered or offered to the plaintiff. All that is averred, is, that the defendant had always been and still was ready and willing to pay. I think that is not enough." The release in this deed is conditional on the composition being paid or tendered. [*Cockburn* C. J. The proviso for sale is, that if default shall be made in payment of the composition, or any instalment thereof, the trust premises shall be sold and the residue of the purchase money applied "in payment rateably of the debts due to the said creditors *respectively*" by the debtor. That shews the intention to be that if any creditor did not receive the instalment he should be at liberty to treat the release as a nullity.] But the proviso which follows the release is, that in case of default in payment of the composition, or any instalment thereof, to the creditors respectively the release shall be at an end, and *the creditors* shall thenceforth be at liberty to "sue for or prove for the full amount of their respective debts," &c. The release is to be at an end if the estate of the debtor is not so administered as that all the creditors shall receive their composition. [*Cockburn* C. J. Then the release would be at an end if one creditor was to remit his debt?] That would be equivalent to payment. The first plea does not allege a payment

(a) 18 C. B. N. S. 286. See *The Ipstones Park Iron Ore Company v. Pattinson*, 2 H. & C. 828; *Garrod v. Simpson*, 3 H. & C. 395. 403; *Martin v. Gribble*, 3 Id. 631. 634.

or tender of the composition to the plaintiffs or to the defendant's other creditors. The second plea, which alleges a tender of the composition to the plaintiffs, and the third plea, which alleges a waiver by the plaintiffs of a tender to them, contain no allegation of payment or tender to the other creditors.

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The sixth, seventh and eighth replications are good. A composition deed under the 192nd section of The Bankruptcy Act, 1861, 24 & 25 *Vict. c. 134.*, which is not *bonâ fide* entered into or approved by the majority of the creditors for the equal benefit of all the creditors, and is only entered into or approved by assenting creditors from motives of kindness or benevolence to the debtor and without any just regard to the rights or interests of all the creditors, and merely to give him a release and discharge for a nominal composition disproportionate to his assets, is not binding upon the non-assenting creditors. In *In re Cowen, ex parte Foster (a)*, Turner L. J. said (b), "The power given by this section to a majority of creditors to bind the minority must, I think, be considered as, or in the nature of, a statutory power, the exercise of which would be binding only when it was fairly and *bonâ fide* exercised. Independently of what must, as I think, be presumed to have been the intention of the Legislature, the words of the section seem to me to import that the absence of any taint of fraud, and the *bona fides* of the arrangement with a view to the benefit of all the creditors, were meant to be essential to the validity of the deeds. The deeds are to be binding on the non-assenting creditors, not absolutely,

(a) 36 *L. J. Bank.* 41; *S. C. Ex parte Cowen. In re Cowen, L. R. 2 Chanc. App.* 563.

(b) 36 *L. J. Bank.* 43.

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but only as if they were parties to and had executed the same ; and even creditors who were parties to and had executed the deeds could not, as I apprehend, have been bound by them if they were tainted by fraud or *mala fides*. . . . In determining whether these conditions have been observed or not, I do not think that the Court will measure in golden scales the propriety of the arrangement which has been made between the debtor and his creditors, or will weigh with nicety the question whether the estate of the debtor would be capable of paying more than the composition agreed upon ; but I think that in order to render such a deed as the one before us binding on non-assenting creditors, the conditions which I have mentioned must in substance have been observed." Having laid down these principles, *Turner* L. J. proceeded to consider the facts, and concluded, p. 44, "I have no doubt whatever that this deed, if not absolutely tainted with fraud, as I strongly suspect it to have been, was not made and entered into bonâ fide for the benefit of all the creditors of the appellant." *Cairns* L. J., p. 45, agreed that, even assuming that there was no fraud, "the transaction was certainly not an exercise of such a discretion on the part of the majority as can be held to be binding upon the minority of the creditors." If this were not so the statutory majority of the creditors might absolutely remit the debts of the other creditors. [*Lush* J. referred to *Daughlish v. Tennent* (a).]

The eighth replication also shews that there was no consideration for the alleged discharge from and waiver by the plaintiffs of a tender of the composition by the defendant. [He declined to argue, against *Keyes v. Elkins* (b), that the deed amounted only to a covenant not

(a) 8 B. & S. 1.

(b) 5 B. & S. 240.

to sue, or, against *Bamford v. Clewes* (a), that the second and third pleas were bad because the amount of the composition was not brought into Court.]

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Sir *George Honyman* (*Lucius Kelly* and *Schalch* with him), for the defendant.—The deed of the 5th *December*, 1866, contains a present release defeasible by condition subsequent, and a default in tender of the composition should be replied. The Common Law Procedure Act, 1852, 15 & 16 *Vict. c. 76. s. 57.*, only allows a general averment of performance of conditions *precedent*; and in note (2) to *Thursby v. Plant* (b) it is said, “The plaintiff need not declare upon any more of the deed than the covenant, although there be a proviso or condition which goes in defeasance of the covenant; for this ought to come from the other side.” Also there is a separate release by each creditor, and the proviso is limited to each creditor. [*Cockburn C. J.* The Court are with you on the point of pleading. The stress of the case against the defendant lies in the eighth replication.]

The exercise by the statutory majority of the creditors of the powers given to them by The Bankruptcy Act, 1861, 24 & 25 *Vict. c. 134.*, is not subject to be reviewed by the Court unless a fraud is alleged. In *In re Cowen, ex parte Foster* (c), the deed of composition was got up to defeat an execution, it was executed by barely the requisite majority of creditors, most if not all of whom were either relatives or intimate friends of the debtor,

(a) *Ante*, p. 539.(b) 1 *Wms. Saund.* 233 a, 6th ed.(c) 36 *L. J. Bank.* 41; *S. C. Ex parte Cowen. In re Cowen, L. R. 2 Chanc. App.* 563.

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and most if not all expected to be paid in full, and the assets were sufficient to pay at least 10s. in the pound, the composition being only 2s. 6d.; the case was treated by the Lords Justices as tainted with fraud. The averment in this replication does not bring the present case within that. In *Daughlish v. Tennent* (a) some creditors were induced by a corrupt bargain to execute the composition deed; therefore there was fraud on the other creditors. The object of these deeds is to avoid bankruptcy if the majority of the creditors agree, and there will be great inconvenience in submitting the question to the jury whether the deed was entered into for the benefit of the whole body of the creditors. [*Lush J.* The replication is in the nature of a bill in equity to set aside the plea.]

H. James, in reply.—As to the first plea. [*Cockburn C. J.* The pleaded deed contains a positive release with a condition that in certain events it should be inoperative: the plaintiff who seeks to get rid of the release by matter ex post facto must reply it.] The effect of the judgment in *Fessard v. Mugnier* (b), in the Court of Common Pleas, is that the release and the proviso are to be read together. [*Hayes J.* There the point that matter ex post facto should come from the other side was not taken. *Cockburn C. J.* Here, the point being raised, we must give effect to it; and therefore give judgment for the defendant on the demurrers to the pleas.]

COCKBURN C. J. As to the 6th, 7th and 8th replications, we are bound by the decision of a Court of co-

(a) 8 B. & S. 1.

(b) 18 C. B. N. S. 286.

ordinate jurisdiction in *In re Cowen, ex parte Foster* (a), especially on a matter which is made the subject of an equitable replication; and I concur in the grounds on which that decision is based by the two learned Lords Justices. The Bankruptcy Act, 1861, substituted a domestic commercial forum for the proceedings in the Bankruptcy Court which consumed a large portion of the assets of the insolvent. Accordingly, by stat. 24 & 25 *Vict. c. 134 s. 192.*, the arrangement which the requisite majority of the creditors should make for payment of the bankrupt's debts and distribution of his estate was to be binding upon the minority; but it was not intended that the majority should release the debtor from payment of his debts so far as his assets would go at expense of creditors who were not disposed to take the same benevolent view of the position of the debtor. The bona fides of such an arrangement depends upon its being entered into with the honest intention to do that which is for the common benefit of the whole body of the creditors, and not for the benefit of the debtor at the expense of the general body of the creditors.

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LUSH J. Stat. 24 & 25 *Vict. c. 134.* assumes that the requisite majority of the creditors in making an arrangement with the debtor will act as persons looking after their own interest; it gives them credit for doing the best for the benefit of the general body of creditors; if they do not bonâ fide so act their arrangement does not bind the non-assenting minority.

HANNEN J. We are bound by the decision of the

(a) 36 *L. J. Bank.* 41; *S. C. Ex parte Cowen. In re Cowen, L. R. 2 Chanc. App.* 563.

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Lords Justices in *In re Cowen, ex parte Foster* (a); it can only be reviewed in a Court of error. I have not examined all the reasons given for that decision so carefully as to express my assent to them ; but I do not think that the Legislature intended to exclude motives of benevolence and kindness to the debtor operating in the minds of those who were empowered to make a binding deed under sect. 192; it was not necessary to guard against the existence of such motives, but against actual fraud in persons representing themselves as creditors who are not. If benevolence and kindness are not proper motives to induce a creditor to execute or assent to a deed, it might follow that if one creditor was influenced by such motives there would not be a sufficient number to make up the requisite majority, and the deed would be invalid. I think that on examination it would be found that the decision of the Lords Justices does not involve that consequence.

HAYES J. The case of *In re Cowen, ex parte Foster* (a), was considered by Judges of great authority, and therefore we are bound by it.

Judgment for the defendant on the demurrers to the pleas, and to the 3rd, 4th and 5th replications ; for the plaintiffs on the demurrers to the 6th, 7th and 8th replications (b).

(a) 36 *L. J. Bank.* 41; *S. C. Ex parte Cowen. In re Cowen, L. R. 2 Chanc. App.* 563.

(b) See the preceding case.

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FORD and others *against* COTESWORTH and
another.

[Thursday,
December
17th.]

1. Whenever a party to a contract undertakes to do some particular act the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time.

2. Where the act to be done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, the law implies that each contracts that he shall use reasonable diligence in performing his part.

3. The contract implied by the law in the absence of any stipulation in a charterparty is, that each party shall use reasonable diligence in performing his part of the delivery of the cargo at the port of discharge, the merchant being ready to receive in the usual manner and the owner by his captain and crew to deliver in the usual manner.

4. A charterparty for a voyage from *Liverpool* to *Lima* or *Valparaiso* provided that the vessel should proceed to the port of discharge, or as near as she could safely get, and there deliver her cargo in the usual and customary manner. A specified number of days were agreed upon for loading the vessel at *Liverpool*, but there was no such agreement as to the discharge at her port of destination. The vessel arrived at the port of discharge and remained discharging till, owing to apprehension of a bombardment by a hostile fleet, the authorities suspended all landing of goods for seven days, after which she returned and her discharge was completed. Held, that there was no implied contract that the cargo should be discharged within the number of days usual and customary in the port for such a vessel, and therefore the loss from the delay occasioned by the extraordinary and unforeseen state of things existing at the time of discharge must fall on the shipowner.

Contract.
Time for
performance.
Reasonable
diligence.
Charterparty.
Time for
discharge of
cargo.

THIS was an action to recover compensation in damages for the detention of the plaintiffs' ship by the defendants.

On the trial, before Cockburn C. J., at Guildhall, after *Trinity* Term, 1867, it appeared that the defendants chartered the plaintiffs' ship from *Liverpool* to *Lima* or *Valparaiso*. By the charterparty a specified number of days were agreed upon for loading the vessel at *Liverpool*, but there was no such agreement as to the discharge at her port of destination, the charterparty

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merely providing that the vessel should proceed there or as near as she could safely get, and there deliver the cargo in the usual and customary manner agreeably to bills of lading, and so end the voyage. The contract being thus silent as to the time which was to be occupied in the discharge, the question arose, what was the agreement which the law implied in such a case?

† The vessel duly arrived at *Callao*, the port of *Lima*, and began to discharge in the manner usual there. The Custom House authorities there will not allow any cargo to be landed except through the customs, and in consequence of their dilatoriness and the general sluggishness of the population the ordinary discharge of a vessel at that place is very slow. The vessel remained discharging till, news having arrived of the approach of the *Spanish* fleet with a hostile intention, the customs authorities suspended all landing of goods in order that they might remove those already in the Custom House out of the reach of apprehended bombardment. The vessel consequently lay with the cargo partly on board for seven days, when she was ordered away to be out of the danger. She returned, and her discharge was finally completed.

The Lord Chief Justice ruled that during the period when the vessel was not at *Callao* at all there was no claim for damage. He reserved for the Court the question whether the plaintiff was entitled to recover for the detention during seven days when the vessel was at her discharging berth, but owing to the unusual state of things the customs authorities would not allow the discharge to proceed. The damages for that detention, if the plaintiff was entitled to recover, were agreed to be 105*l*. As to the rest of the detention, he left the question to the jury whether the detention was occa-

sioned by anything beyond the usual and ordinary delays of the port. The jury found on this point for the defendant.

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In *Michaelmas* Term,

Field obtained a rule nisi to enter the verdict for the plaintiff for 105*l.* pursuant to the leave reserved, or for a new trial on the ground that the verdict was against the weight of evidence. No complaint was made of the direction in point of law.

The case was argued in *Trinity* Term, May 22, 23, 25, before BLACKBURN, MELLOR and LUSH JJ.

Milward and *Charles Russell*, for the defendants, cited *Rodgers v. Forresters* (a); *Burmester v. Hodgson* (b); *Phillips v. Irving* (c); *Harris*, appt., *Dreesman*, respt. (d); *Goodwyn v. Cheveley* (e); *Hudson v. Ede* (f); affirmed in error (g).

Field and *Philbrick*, for the plaintiffs, cited *Paradine v. Jane* (h); *Randall v. Lynch* (i); and *S. C., in banc* (j), where the ruling of Lord *Ellenborough* at *Nisi prius* was not objected to; *Barret v. Dutton* (k); *Brown v. Johnson* (l); *Kearon v. Pearson* (m); *Adams v. The Royal Steam Packet Company* (n); *MacLachlan on Shipping* 445.6. [*Lush J.* referred to *Hill v. Idle* (o).]

(a) 2 *Camp.* 483.

(b) 2 *Camp.* 488.

(c) 7 *M. & G.* 325.

(d) 23 *L. J. Exch.* 210; *S. C. Dreesman*, appt., *Harris*, respt., but not *S. P.*, 9 *Exch.* 485.

(e) 4 *H. & N.* 631.

(f) 8 *B. & S.* 631.

(g) 8 *B. & S.* 639.

(h) *Al.* 26, 27.

(i) 2 *Camp.* 352.

(j) 12 *East* 179.

(k) 4 *Camp.* 333.

(l) 10 *M. & W.* 331. 334.

(m) 7 *H. & N.* 386.

(n) 5 *C. B. N. S.* 492.

(o) 4 *Camp.* 327.

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The Court refused to disturb the verdict on the other points, but as to the leave reserved,

Cur. adv. vult.

LUSH J. now delivered the judgment of the Court.

[After stating the facts as in pp. 559-560.] We have come to the conclusion that the plaintiff is not entitled to recover.

The question depends upon what the contract implied by law is where there is a charterparty silent as to the time to be occupied in the discharge. We agree that whenever a party to a contract undertakes to do some particular act the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances. And if some unforeseen cause over which he has no control prevents him from performing what he has undertaken within that time he is responsible for the damage. But where the act to be done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, there is no principle on which, in the absence of a stipulation to that effect, either expressed by the parties or to be collected from what they have expressed, the damage arising from an unforeseen impediment is to be cast by law on the one party more than on the other, and consequently we think that what is implied by law in such a case is not that either party contracts that it shall be done within either a fixed or a reasonable time, but that each contracts that he shall use reasonable diligence in performing his part.

It is on the application of this principle to a charter-party that the present question depends. We think that delivering cargo is as much the duty of the shipowner as of the merchant, and consequently that the contract implied by the law in the absence of any stipulation in a charterparty is, that each party shall use reasonable diligence in performing his part of the delivery of the cargo at the port of discharge, the merchant being ready to receive in the usual manner and the owner by his captain and crew to deliver in the usual manner. So that there is no contract implied by law on the part of the shipowner to allow his vessel to be kept there for the usual time if by reasonable diligence on the part of the merchant the cargo might be sooner taken away, and no contract implied by law on the part of the merchant to take the cargo out within such usual time notwithstanding he could not by reasonable diligence perform it, though very commonly there are stipulations to that effect.

There is not much authority bearing on the point on which we have had most difficulty. We think it firmly established both by decided cases and on principle that where a party has either expressly or impliedly undertaken without any qualification to do anything and does not do it he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control. And in a charterparty the merchant generally expressly contracts that he will provide a cargo to be put on board. The shipowner has nothing whatever to do with the mode in which the merchant is to fulfil this contract. Accordingly where the merchant is prevented by an unforeseen cause from fulfilling it the shipowner is

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entitled to compensation in damages; *Barker v. Hodgson* (a). In the present charterparty, as is generally the case, the parties have agreed on a specified number of lay days for putting the cargo on board. Where a charterparty is silent, as it rests exclusively on the merchant to procure the cargo, the law would imply a contract to do so within a reasonable time after the vessel is ready to receive cargo. And we agree that in estimating what is the reasonable time within which the cargo is to be provided we are to consider what is a reasonable time under ordinary circumstances, and not to take into account any peculiar difficulty which may have arisen from the mode in which the merchant has chosen to procure the cargo; *Adams v. The Royal Mail Steam Packet Company* (b), *Kearon v. Pearson* (c). It may be different if the contract is framed with reference to any peculiar state of things; *Harris*, appt., *Dreesman*, respt. (d).

It would rather appear from the declaration set out in the report of *Adams v. The Royal Mail Steam Packet Company* (b) that the contract expressly provided for a number of lay days and ten days on demurrage, but perhaps those were only allowed for the discharge of the cargo at *St. Thomas*, otherwise no question as to any implication of a reasonable time could have arisen. However this may have been, it is pointed out by *Williams J.*, p. 494, that "the circumstances relied on to excuse the breach are circumstances which impeded, not the loading but the procuring the coals wherewith to

(a) 3 M. & S. 267.

(b) 5 C. B. N. S. 492.

(c) 7 H. & N. 386.

(d) 23 L. J. Exch. 210; S. C. *Dreesman*, appt., *Harris*, respt., but not S. P., 9 Exch. 485.

load the vessel," and that was unquestionably true ; the case was clearly rightly decided, but the present point did not arise. In *Kearon v. Pearson* (a) *Wilde* B. says the stipulation in that case that the vessel shall "be loaded with usual dispatch" does not relate to the facilities which the charterers may have in their trade of getting the coal alongside the vessel (which by express stipulation was to be loaded in the *Nelson Dock*), but to the putting it on board ; and that even if it were otherwise there was an express stipulation that it should be loaded "with usual dispatch," not "with usual diligence." In this also we perfectly concur, but that case has no bearing on the question of what is implied when the contract is silent as to the time for discharging the cargo.

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Whenever in the charterparty it is agreed that a specified number of days shall be allowed for unloading, and that it shall be lawful for the freighter to detain the vessel for that purpose a further specified time on payment of a daily sum, this constitutes a stipulation on the part of the freighter that he will not detain her beyond those two specified periods ; *Randall v. Lynch* (b). Lord *Tenterden* (*Abbott on Shipping*, p. 181, 5th ed.), says, "And where the time is thus expressly ascertained and limited by the terms of the contract the merchant will be liable to an action for damages if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, *for he has engaged that it shall be done.*" The last sentence is put in italics by Lord *Tenterden*, indicating that he thought it the reason why the merchant was liable. In the present case the time for discharging is not so limited ; all that is said is that the cargo shall be dis-

(a) 7 H. & N. 386.

(b) 2 Camp. 352.

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charged in the usual and customary manner, that is to say, that the master and crew shall take that part which by the custom of the port falls on them and the freighter do the rest.

And, as we have before observed, it is difficult to see on what principle delay in an act in which both sides are to concur is, in the absence of a stipulation in the contract, to fall on one more than the other if neither be in fault. In *Rodgers v. Forresters* (a) the express contract "was that the said freighter should be allowed the usual and customary time to unload the said ship or vessel at her port of discharge;" and in *Burmester v. Hodgson* (b), where the contract was silent, *Mansfield* C. J. said that the law could only raise an implied promise to do what was, in *Rodgers v. Forresters* (a), stipulated for by an express covenant, viz., to discharge the ship "in the usual and customary time." On this *Mr. Field* based his argument that the charterparty was to be construed as if a specified number of lay days for discharging the cargo had been inserted in it, the only difference being that instead of the parties fixing the number of days they left that to be ascertained by subsequent inquiry as to what was usual and customary in the port for such a vessel. And, if that is so, it would follow that the plaintiff is entitled to recover, for it is clear that delay resulting from a threatened bombardment was neither usual nor customary. But we are aware of no authority for saying that the law implies a contract to discharge in the usual time except what is said in *Burmester v. Hodgson* (b), in which case it was not necessary for the decision.

We think that the contract which the law implies is

(a) 2 Camp. 483.

(b) 2 Camp. 488.

only that the merchant and shipowner should each use reasonable dispatch in performing his part. That such was the opinion of Lord *Tenterden* appears to be implied from his ruling in *Rogers v. Hunter* (a) as to what was the obligation of the holder of a bill of lading.

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If this be so, the delay having happened without fault on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls. It is true that at *Callao* the usual course appears to be for the merchant to procure lighters, and that the master and crew have fulfilled their part of the duty of delivering cargo when they assisted in getting the cargo out of the ship and putting it on board the lighters, and it might have been physically possible for the merchant in this case to have procured so many lighters that the cargo might have been all taken out of the ship and put in those lighters, though the customs authorities would not permit any of those lighters to be unloaded, but the construction of the charterparty must be the same whatever by the custom of the port of discharge be the share of the shipowner in delivering cargo, and we do not think that the merchant was bound to do such an unreasonable thing.

If the contract be, as we construe it, only to use reasonable diligence in performing his part of the delivery, he was guilty of no breach whilst the landing of the cargo was rendered impossible by a cause over which he had no control.

We think therefore the rule should be discharged.

Rule discharged.

(a) *M. & M.* 63.

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*Saturday,
May 30th.*

*Poor rate.
Lease of canal
to railway
Company.
Guarantie.*

**The QUEEN against The Overseers of the Parish
of LAPLEY and the Assessment Committee
of the Union of PENKRIDGE.**

In pursuance of an Act of Parliament *The S. U. Railways and Canal Company* granted a lease in perpetuity of their undertaking to *The L. & N. W. Railway Company*, under the provisions of which a canal, part of their undertaking, was worked and managed by a joint committee in the name of *The S. U. Railways and Canal Company*, and was worked by *The L. & N. W. Railway Company*, and *The L. & N. W. Railway Company* made up to the shareholders of *The S. U. Railways and Canal Company* the deficiency in the earnings of their undertaking, in accordance with the guarantee in the lease of the payment of certain rents or sums of money in the nature of rent. Held, that the annual rent or sum of money received by *The S. U. Railways and Canal Company* from *The L. & N. W. Railway Company* under the lease was not to be taken into account in determining the rateable value of the canal.

ON appeal against a rate for the relief of the poor of the parish of *Lapley*, in the Union of *Penkridge*, in the county of *Stafford*, in which *The Shropshire Union Railways and Canal Company* were rated as owners and occupiers of "Canal, Feeder, &c.," rateable value 817*l.*, the Quarter Sessions reduced the rate and fixed the rateable value at 74*l.* 19*s.* 6*d.*, being at the rate of 36*l.* per mile, subject to the opinion of this Court upon the following case.

The Shropshire Union Railways and Canal Company were constituted a Company by that name, and authorised to construct certain lines of railways, and empowered to stop up and discontinue certain canals and parts of canals vested in them by three several Acts of Parliament passed in the year 1846, viz., *The Shropshire Union Railways and Canal (Shrewsbury and Stafford) Railway Act, 1846*, *The Shropshire Union Rail-*

ways and Canal (*Newtown and to Crewe with branches*) Act, 1846, *The Shropshire Union Railways and Canal (Chester and Wolverhampton Line)* Act, 1846.

The canal, a part of which was the subject of the appeal, was formerly *The Birmingham and Liverpool Junction Canal*, portions of which the Company were by the last of these Acts authorized to stop up.

By *The Shropshire Union Railways and Canal Lease Act*, 1847, reciting that it had been agreed between *The Shropshire Union Railways and Canal Company* and *The London and North Western Railway Company*, with a view to the convenient and economical working of the railways by the recited Acts authorized, that a lease in perpetuity of the undertaking of *The Shropshire Union Railways and Canal Company* should be granted to *The London and North Western Railway Company*, *The Shropshire Union Railways and Canal Company* were on the completion of the authorized works empowered and required to grant to *The London and North Western Railway Company*, who were required to accept the same, a lease in perpetuity of the undertaking of their Company at the rent and upon the terms contained in the last mentioned Acts. Under this Lease Act a Joint Committee of *The Shropshire Union Railways and Canal Company* and of *The London and North Western Railway Company* was appointed, under whose directions the canals are managed and worked in the name of *The Shropshire Union Railways and Canal Company*, and the powers for the undertaking of the railways on their completion were vested in *The London and North Western Railway Company* subject to the directions of the Joint Committee.

By *The Shropshire Union Railways and Canal Act*,

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1854, it was enacted that the several canals to and in which *The Shropshire Union Railways and Canal Company* were then entitled or interested, and their railway from *Stafford* to *Wellington*, and a share in the continuation thereof to *Shrewsbury*, should be and they were thereby declared to constitute the undertaking of *The Shropshire Union Company* for all the purposes of the recited Acts and for all purposes whatsoever.

By an indenture made the 25th *March*, 1857, between *The Shropshire Union Railways and Canal Company* and *The London and North Western Railway Company*, the undertaking as defined by the last mentioned Act of 1854 was leased to *The London and North Western Railway Company* in perpetuity on the terms authorised by the Lease Act of 1847, viz., first, payment of interest of the canal debt of 814,207*l.* at the rate the same should actually carry for the time being ; second, a sum equal to half the *London and North Western* dividend for the time being on 1,552,564*l.* 10*s.* 5*d.*, being the amount of the Railway and Canal share capital.

Under the provisions of this lease, the canal of which the subject of this appeal is part is worked and managed by the Joint Committee in the name of *The Shropshire Union Railways and Canal Company*, and is worked by *The London and North Western Railway Company*, and *The London and North Western Railway Company* make up to the shareholders of *The Shropshire Union Railways and Canal Company* the deficiency in the earnings of their undertaking in accordance with the guarantie in the lease. These payments make up the rents or sums of money in the nature of rent mentioned in the lease. The justices found that the actual net profit on the working of the canal in the parish amounted to 36*l.* per

mile, and they fixed that sum as the basis of the rateable value of the occupation of the land in the parish.

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Staveley Hill (McIntyre with him), for the appellants.—The amount of profit earned by the appellants' canal in the parish of *Lapley* is the sole basis upon which, after making the usual deductions, the rateable value of the undertaking in that parish is to be calculated. The sum paid under the guarantie by *The London and North Western Railway Company* to make up any deficiency of earnings is not a profit earned in the parish of *Lapley*, and therefore is neither rateable itself nor to be taken into account in estimating the rateable value of the undertaking.

Gray (Beresford with him), for the respondents.—The sum which the appellants receive from *The London and North Western Railway Company* is rent, and therefore to be taken into account in arriving at the net annual value to the appellants of the canal in the parish of the respondents. In *The Newmarket Railway Company v. The Overseers of St. Andrew the Less, Cambridge (a)*, *Coleridge* and *Erle JJ.*, differing from *Lord Campbell*, held that a payment to one railway Company by another, under agreement, of such a sum as might be necessary to make up a certain dividend on the cost of the line in consideration of the making of a part of it and of working it for the benefit of the latter Company, was not rent nor money in the nature of rent paid for the use of the railway, and therefore was not to be taken into account in assessing the rateable value of the

(a) 3 E. & B. 94.

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railway. But in *Reg. v. Fletton* (a) *The Eastern Counties Railway Company*, being the sole proprietors and occupiers of a railway station on their line, entered into an agreement with *The London and North Western Railway Company*, by which the latter were for a certain annual payment to have for 999 years the joint use of the station for their traffic, *The Eastern Counties Railway Company* continuing to be occupiers of the station subject to such use; the annual value of the station owing to a diversion of traffic having become worth much less to *The London and North Western Railway Company*, it was nevertheless held that *The Eastern Counties Railway Company* were properly rated on the full amount paid by *The London and North Western Railway Company*. If *The London and North Western Railway Company* had been joint occupiers of the station the question would have been different; *Reg. v. Lord Sherard* (b). [*Lush J.* referred to *Allison v. The Overseers of Monkwearmouth Shore* (c). *Blackburn J.* If the appellants are occupiers of the canal at all it must be as tenants at will to *The London and North Western Railway Company*.]

Staveley Hill was not called upon to reply.

BLACKBURN J. The Sessions were right. The appellants are owners of the undertaking and not liable to be rated as such. In pursuance of *The Shropshire Union Railways and Canal Lease Act, 1847*, they executed a

(a) 3 E. & E. 450.

(b) 33 L. J. M. C. 5.

(c) 4 E. & B. 13. See *The Overseers of Sunderland v. The Guardians of Sunderland Union*, 18 C. B. N. S. 531.

lease of the undertaking to *The London and North Western Railway Company*, under the provisions of which the canal is worked by that Company, who make up to the shareholders of the appellants the deficiency in the earnings of their undertaking in accordance with the guarantie in the lease. Mr. *Gray* argues that the appellants, being in occupation of the canal, are rateable not only for the profits of the undertaking but also for the sums received in the nature of rent under their bargain with *The London and North Western Railway Company*; that their interests are necessarily blended, and that the payment under the lease is annexed to the occupation as a payment of rent by a subtenant to a mesne tenant. But I cannot perceive that. In *Reg. v. Fletton (a) The London and North Western Railway Company* were not joint occupiers of the station, they had merely an easement in it, and I hesitated long before I agreed to the judgment because I doubted whether it was not a personal contract, only accidentally connected with the station and therefore not to be taken into account; but ultimately I agreed on the ground that *The Eastern Counties Railway Company* as occupiers of the station derived profit not only from their own use of it but also in respect of the sum annually paid by *The London and North Western Railway Company* for the use of it. The present case is different; it is as if a landlord let premises to a tenant and the tenant agreed with his landlord that he should manage the property and take the profits in discharge of the rent; in that case the landlord would not be rateable in respect of what he received as

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(a) 3 E. & E. 450.

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landlord and not as occupier. Again, suppose a ground landlord became tenant under his lessee, the rateable value would not be increased by the ground rent received. If the occupation and the interest were blended together the question would be different.

MELLOR J. The effect of the lease is that this payment is not a profit derived from the occupation of the canal.

LUSH J. The question depends upon the true position of the parties ascertained by The *Shropshire Union* Railways and Canal Lease Act, 1847, and the acts of the parties. Here the appellants demised the undertaking to *The London and North Western Railway Company*, and the annual sum paid by that Company is by way of rent ; it is like the case put by my brother *Blackburn* of premises let by *A.* to *B.*, which *B.* lets back to *A.* at a reduced rent ; in which case, though *A.* is in occupation of his own property, he is not rateable in respect of the rent paid by *B.*, because it is not the true measure of the rateable value.

Order of Sessions confirmed.

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IN THE EXCHEQUER CHAMBER.

FLEET, administratrix of MARY ANN ROSS, *against*
PERRINS.

Friday,
May 22nd,
1868.
[Wednesday,
May 12th,
1869.]

In an action by the administratrix of a wife it appeared that the defendant had written letters to the wife promising to hold at her disposal a sum of money which he had received from a third person. The husband did not interfere either to allow her to have the controul of the money or to prevent her from dealing with it. He survived her, and then died. To prove the amount the plaintiff offered in evidence an examined copy of the defendant's answers to interrogatories in a previous action in which the plaintiff had sued the representative of the husband, but which was discontinued. Held,

By the Court of Queen's Bench,

1. That the answers were admissible without proof of the interrogatories.
2. That an examined copy of the answers was admissible without proof of the defendant's handwriting to the original answers.

By the Court of Queen's Bench, and affirmed in the Exchequer Chamber by *Willes* and *Smith* JJ. and *Channell* and *Cleasby* BB., and *semble* per *Keating* J., *Kelly* C. B. dissentiente,

3. That the gift of money was a chose in action conferred on the wife with which the husband did not during coverture interfere, and therefore the action was properly brought by the representative of the wife.

Baron and
feme.
Chose in action
of wife.
Action by
representative
of wife.
Evidence.
Answers to
interrogatories.

DECLARATION by the plaintiff, as administratrix of the personal estate and effects of *Mary Ann Ross*, deceased, for money received by the defendant for the use of *Mary Ann Ross*, and on accounts stated between them.

Plea. Never indebted.

Issue thereon.

On the trial, before *Lush* J., at the Sittings in *Middlesex* after *Trinity* Term, 1867, it appeared that the plaintiff, as administratrix of her son, *Thomas Ross*, had commenced an action against the defendant for money had and received to the use of her son during his lifetime. In answer to interrogatories administered in that action the defendant stated that she had received a sum

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of 119*l.* 2*s.* 1*d.* to give to the son's wife, but had never held it for his use. The son having survived the wife, the plaintiff discontinued that action and commenced the present as administrator of her son's wife. Letters from the defendant to the wife were produced, which were such as, if addressed to a feme sole, would beyond all doubt have shewn that the defendant promised her to hold some money which she acknowledged that she had received from a third party at the wife's disposal, but not shewing the amount. There was no evidence that the husband in any way interfered either to allow his wife to have the control of this money or to prevent her from dealing with it, nor indeed that he knew of its existence.

To prove the amount the plaintiff offered in evidence an examined copy of the defendant's answers to the interrogatories in the former action of *Fleet, administratrix of Thomas Ross, v. Perrins*. These were objected to unless the interrogatories to which they were answers were also proved, and unless the defendant's handwriting to the original answers was also proved. The plaintiff was not prepared with evidence of either, and the learned Judge received the evidence subject to the objection.

It was further objected that the cause of action would not have survived to the wife if she had survived her husband, and that therefore the action was misconceived.

The learned Judge directed a nonsuit, with leave to move to enter a verdict for the plaintiff for 119*l.* 2*s.* 1*d.*, the Court to have the same power to amend as a Judge at Nisi prius.

In *Michaelmas* Term, 1867,

Huddleston obtained a rule nisi accordingly.

The rule was argued in *Easter Term, May 6, 1868* :
before BLACKBURN and LUSH JJ.

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Prentice and *Gorst* shewed cause.—First. The answers to the interrogatories administered in the former action were not evidence without putting in the interrogatories, on the same principle that when an answer to a bill in Chancery is produced in evidence the party against whom it is produced is entitled to have the whole bill read ; *Pennell v. Meyer* (a), per *Tindal* C. J. [*Lush* J. How do these answers differ from an answer to a letter, which is admissible against the writer of it without the letter to which it is an answer? What good would the interrogatories do unless the answers were ambiguous? *Blackburn* J. In 1 *Phill. and Amos Ev.* 360 it is said, “Where an answer or depositions in Chancery are offered in evidence, as to the admissions of a party upon oath, or for the purpose of contradicting a witness, it appears not to be necessary to produce any of the other proceedings, as the bill, answer, or decree, for the purpose of elucidating the admission.”] The authorities cited do not support that position ; and in the 10th ed., by *Phillipps and Arnold*, p. 816, *Pennell v. Meyer* (a) is cited in support of the contrary. [*Lush* J. referred to *Richards v. Morgan* (b).]

Secondly. The copy of the answers is not admissible without proof of the defendant’s signature to the original answers. In *Barnes v. Parker* (c) *Martin* B. refused to admit an office copy of an affidavit purporting to be that of the defendant without proof of the defendant’s signature to the original. [*Blackburn* J. Proof of the defendant’s

(a) 2 M. & Rob. 98.

(b) 4 B. & S. 641.

(c) 15 L. T. N. S. 218.

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handwriting was not necessary if the affidavit was proved to be his.]

Thirdly. It appears from the answers to the second and third interrogatories that this was money received by the defendant for the wife during marriage, which became at once the property of the husband, and, he having survived her, he only, or his representatives after his death, can sue for it, whether the money was a gift to the wife or payment of a debt due to her before marriage. In 1 *Williams Executors*, p. 816-7, 6th ed., it is said, "Where on a bond to the wife, *dum sola*, the husband gives a letter to another to receive the money, who receives it, and then the wife dies, the husband shall bring an action to recover it from the receiver, individually, and not as his wife's administrator. So where a legacy was left to a *feme sole*, who afterwards married, and then the husband and wife gave a letter of attorney to another to receive the money, who received it, and afterwards the wife died, and then the husband died; it was held that the action was well brought by the husband's administrator: because the receipt changed the property to the husband alone." For these positions is cited *Huntley v. Griffith* (a), where *Garody J.*, *Gouldsb.* 160, said, "When the money is received to the use of the husband and the wife, now by that the husband hath an interest." The money being always virtually in the possession of the husband there was no occasion for a reduction into possession. In *Bird v. Peagrum* (b) a married woman had deposited with the defendant rents to which she was entitled for her separate use, and it was held that upon her death her husband was entitled to bring an

(a) *Moor.* 452; *S. C. Gouldsb.* 159, pl. 91.

(b) 13 *C. B.* 639.

action in his own right to recover the money so deposited. [*Lush J.* The present case would be within that if the wife had sent back the money to the defendant to keep for her. *Blackburn J. Philliskirk v. Pluckwell* (a), in which it was held that husband and wife may sue on a promissory note made to the wife during coverture, shews that a contract may be made with a married woman.] In *Gaters v. Madeley* (b) *Parke B.* said, pp. 426-7, "When a chose in action, such as a bond or note, is given to a feme covert, the husband may elect to let his wife have the benefit of it, or if he thinks proper he may take it himself; and if in this case the husband had in his lifetime brought an action upon this note in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is, and in that case the remedy on it survives to the wife, or he may, according to the decision in *Philliskirk v. Pluckwell* (a), adopt another course, and join her name with his own; and in that case, if he should die after judgment, the wife would be entitled to the benefit of the note, as the judgment would survive to her." [They also cited *Bidgood v. Way* (c), *King v. Basingham* (d), *Molony v. Kennedy* (e), *Tugman v. Hopkins* (f), *Messenger v. Clarke* (g), *Bac. Abr. Baron and Feme* (D).] The defendant was the mere agent of the wife and could not do anything for the wife which the wife could not do herself. As soon as the money got into the hands of

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(a) 2 *M. & S.* 393.(b) 6 *M. & W.* 423.(c) 2 *W. Bl.* 1236.(d) 8 *Mod.* 199. 341.(e) 10 *Sim.* 254.(f) 4 *M. & G.* 389; 5 *Scott N. R.* 464.(g) 5 *Exch.* 388.

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the defendant as agent of the wife it became the husband's. In the cases of a promissory note or bond the husband has an election not to reduce them into possession; but this being money, and not a specific chattel, the action to recover it must be by husband and wife, and on her death it belongs to the husband.

Marshall Griffith, in support of the rule.—[*Blackburn J.* We dispense with any argument on the points of evidence.]

Thirdly. The action is rightly brought. The money sought to be recovered was a chose in action of the wife and never came into her possession. [*Blackburn J.* Not into her physical possession. *Lush J.* But she had power to dispose of it.] The donor might countermand his authority until it was executed or some binding engagement was entered into between the agent and the person who was the object of the remittance which gave the latter a right of action against the former; *Williams v. Everett (a)*, *Brind v. Hampshire (b)*, per *Parke B.* Marriage is only a qualified gift of choses in action to the husband on condition that he reduces them into possession. In 1 *Williams Exors.* p. 793, 6th ed., it is laid down as a general rule of law "that choses in action, which are given to the wife, *either before or after marriage*, survive to her after the death of her husband, provided he has not reduced them into possession: but with this distinction, that as to those which come during the coverture, the husband may, for them, bring an action in his own name; may disagree to the interest of the wife; and that recovering in his own name is equal to reducing them into possession." [*Lush J.* Here the

(a) 14 *East* 582. 597.(b) 1 *M. & W.* 365. 372-3.

husband did not disagree to the interest of the wife.] In the cases cited on the other side the husband intervened by taking some step to assert his right. In 1 *Williams Exors.* p. 797, 6th ed., *Gaters v. Madeley* (a), where all the cases were reviewed, is cited as “decisive in favour of the wife’s right by survivorship,” and it is added, p. 798, “The authority of *Gaters v. Madeley*, and the wife’s right of survivorship accordingly, have been fully established by the subsequent cases of *Sherrington v. Yates* (b), in the Exchequer Chamber, and *Hart v. Stephens* (c) and *Scarpellini v. Atcheson* (d), in the Queen’s Bench.” [He also cited *Betts v. Kimpton* (e), per Lord *Tenterden*.] [Blackburn J. Is there any distinction between a written instrument, as a bond or note, and a parol contract?] A bill of exchange given to the wife is a chose in action on the ground that it is a contract with her. And here was a written acknowledgment of the receipt of the money. In 1 *Williams Exors.* p. 799, 6th ed., arrears of rent accrued in the lifetime of the husband are mentioned as an instance of a chose in action. There was no reduction of this chose in action into possession by the husband: no act whatever was done by him; and a mere intention is insufficient; 1 *Williams Exors.* p. 802, 6th ed.

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Cur. adv. vult.

BLACKBURN J. now delivered the judgment of the May 22, 1868.
Court.

[After stating the facts and the ruling of the Judge at the trial, as ante pp. 575-6.] On the argument we were

(a) 6 *M. & W.* 423.(b) 12 *M. & W.* 855.(c) 6 *Q. B.* 937.(d) 7 *Q. B.* 864.(e) 2 *B. & Ad.* 273. 276.

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clearly of opinion that the evidence was properly received. According to the decision in *Richards v. Morgan* (a) a party using in a suit the deposition of a third person makes that deposition evidence against himself for all the world, as the using of it is an admission by conduct that its contents are true. A multo fortiori the deposition, purporting to be by the defendant herself and used in another action against the present plaintiff, is admissible without further proof than that it was used by the defendant in that action. And we think that, though the defendant was undoubtedly entitled to put in the interrogatories and require them to be read as explanatory of the admission; just as if part of a conversation had been given in evidence, the defendant might on cross examination or by independent evidence prove the rest of the conversation, or, if a letter purporting to be part of a correspondence were given in evidence, might give in evidence the other letters to explain it; yet the not producing the interrogatories did not render the answers inadmissible in evidence, but was only matter of remark of more or less force that the evidence not produced might have altered the nature of the apparent admission. In a case like the present, where the answers were quite intelligible by themselves, that remark would have no effect whatever.

We took time to consider the effect of the cases as to whether on this evidence the action could properly be brought by the wife's representative or should have been brought by the husband's representative.

There is no doubt that all personal property of a corporeal nature, such as goods or cash belonging to the wife before marriage, vests in the husband by the

(a) 4 B. & S. 641.

marriage, and that all such property given to or acquired by the wife after marriage also vests in the husband. But choses in action belonging to the wife before marriage do not vest in the husband unless he does some act to reduce them into possession during the coverture, and even during coverture the husband may permit the wife to make a contract, in an action on which he *may* join with her during her life, though he may disaffirm her interest and sue on the contract as made with himself alone. If he does permit the wife to make such a contract and does not reduce it into possession during the coverture it survives to the wife. The earlier cases illustrating this rule are cases of written contracts, such as bonds or promissory notes given to the wife or the husband and wife during coverture. As to those the rule of law is stated in 1 *Williams Exors.* p. 798, 6th ed., to be fully settled "that if there be a bill or note made to a married woman during coverture, the husband may sue alone upon it, or permit his wife to take an interest in it; in which latter case it appears to stand on the same footing as if it had been made to her before coverture." Except from the difficulty of shewing that the contract was in fact made with the wife, we see no reason why the rule of law should be different in this respect in cases of a contract in writing and any other, and we think that the decision in *Dalton v. The Midland Counties Railway Company* (a) fully bears out what is said by Sir E. V. Williams in the last edition of his valuable work, vol. 1, p. 794, that "It may be stated, generally, that a married woman, though incapable of making a contract, is capable of having a *chose in action* conferred on her, which will survive to her on the death of her husband, unless he shall have

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(a) 13 C. B. 474.

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interfered by doing some act to reduce it into possession."

We were much and properly pressed on the argument with the case of *Bird v. Peagrum* (a), decided by the same Judges and within a fortnight after their decision in *Dalton v. The Midland Counties Railway Company* (b), which therefore must certainly have been supposed by them to be consistent with their former decision, though some of the expressions reported to have been used by *Jervis* C. J. in the later case are not very consistent with the language used in the considered judgment delivered in the former.

We think however that in the present case the facts shew that there was a chose in action conferred on the wife, with which the husband did not during coverture interfere. The money did not, according to the rule in *Williams v. Everett* (c), become the money of the person on whose behalf it was remitted until the deposittee had by some act attorned to that person, up to which time it remained the money of the party remitting it. The money here was remitted for the use of the wife and of her alone. And the letters of the defendant attorning to the remittee were addressed to the wife alone and were promises to her to hold the money at her disposal, and there never was anything done to vest either in the husband or the wife any property in any coin as a personal chattel, so that it remained a mere chose in action in the wife, with which the husband did not interfere.

We think therefore that the rule to enter the verdict for the plaintiff must be made absolute.

Rule absolute.

(a) 13 C. B. 639.

(b) 13 C. B. 474.

(c) 14 East 582.

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The defendant appealed from this decision, and the case was argued in *Easter Vacation*, 1869, *May* 11, 12, and judgment given on the latter day.

Prentice (*Gorst* with him), for the defendant.—The general rule is that on promises made to the wife during coverture the husband may sue alone in his own name or jointly in the name of himself and his wife, except in the case of a bond or promissory note given to the wife, because no person can sue on those instruments unless his name appears as obligee or payee. [*Channell* B. There is an exception also in the case of choses in action belonging to the wife; if the husband does not reduce them into possession during coverture they survive to the wife.] Dividends on railway shares purchased by the wife with money earned in service before and after marriage are also an exception; *Dalton v. The Midland Counties Railway Company* (a); and the decision there was that, the non joinder of the husband not having been pleaded in abatement, the wife might maintain the action. *Bird v. Peagrum* (b), in which the old authorities are referred to, shews that the husband is in the present case entitled to bring an action in his own right. [*Willes* J. That was the case of a wife taking her husband's money and placing it in the bank in her own name. *Kelly* C. B. Is there any instance of an action in the joint names of husband and wife where the cause of action arose during the coverture?] No. In *Bidgood v. Way* (c) it was held that the count for money had and received to the use of husband

(a) 13 C. B. 474.

(b) 13 C. B. 639.

(c) 2 W. Bl. 1236. 1240.

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and wife could not be supported by intendment, and *Abbot v. Blofield* (a) is to the same effect. In *King v. Basingham* (b) an action was brought by husband and wife for money lent by them; after verdict for the plaintiffs it was moved in arrest of judgment that the wife ought not to have been joined with her husband. Judgment having been affirmed, a writ of error was brought in this Court; and *Pratt C. J.* said, p. 200, "If the money was lent during coverture, the declaration is false, because then the wife could have no money." The case was adjourned, and ultimately, p. 342, "The Court inclined against the plaintiff, for it being laid *ad damnum ipsorum* made the declaration ill; and so it was adjudged in *Cro. Jac.* 479," *Marshal v. Doyle*. *Cro. Jac.* 478 seems the case meant. In *Johnson v. Lucas* (c) a declaration by husband and wife on an account stated was held bad for want of averring that the account was stated concerning money due to the wife in her right, or otherwise shewing her interest in the money. [He also cited *Carne v. Brice* (d), *Tugman v. Hopkins* (e), *Molony v. Kennedy* (f).] *Willes J.* Suppose a feme sole employs an auctioneer to sell goods and the proceeds of the sale are not due until after she has married.] In that case the facts must be specially stated in the declaration. [*Cleasby B.* Husband and wife may join in trover for the conversion of the wife's property during coverture if it be alleged in the declaration to her damage.]

He gave up the other points.

(a) *Cro. Jac.* 644.(c) 1 *E. & B.* 659.(e) 4 *M. & G.* 389.(b) 8 *Mod.* 199. 341.(d) 7 *M. & W.* 183.(f) 10 *Sim.* 254.

Brown (*Marshall Griffith* with him), for the plaintiff.—

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The plaintiff is administratrix of the husband and also of the wife, but the law does not allow a plaintiff to sue in both characters. [*Smith* J. It is a great reproach to the law that such should be the fact.] According to *Williams v. Everett* (a) neither husband nor wife could have sued for this money until the defendant had attorned to the wife; therefore it was a chose in action of the wife in the defendant's hands; and, not having been reduced into possession by the husband, it must be recovered by the wife's representative; *Betts v. Kimpton* (b), per Lord *Tenterden*. That case was acted upon in *The Attorney General v. Partington*, in the Exchequer Chamber (c), where it was held that a married woman entitled as next of kin to the estate of an intestate having died without asserting her claim, leaving her husband surviving, who also died without asserting his claim, it was necessary for the next of kin of the husband to take out letters of administration to both husband and wife; and *Willes* J. in delivering the judgment of the Court pointed out, p. 205, that the right which a surviving husband has to the personal chattels of his deceased wife without administration "does not directly extend to the claim of a wife only in the nature of a debt." [*Kelly* C. B. That case, which was afterwards in the House of Lords, contains much useful learning.] A debt is the simplest form of a chose in action, but whatever is not reduced into possession is such, and the rule applicable to choses in action of the wife is not confined to bonds or promissory notes, *Co. Litt.* 351 b. [He also cited 1 *Williams Exors.* pp. 792-3, 6th ed., 4 *Vin. Abr.* 118, *Baron and*

(a) 14 *East* 582

(b) 2 *B. & Ad.* 273. 276.

(c) 3 *H. & C.* 193.

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Feme (D. a), citing in margin *Dembyn v. Brown* (a). Also *Wills v. Nurse*, in error (b), *Ex parte Norton*. *Re Selby* (c), *Bendix v. Wakeman* (d), *Howard v. Oakes* (e).] *Bidgood v. Way* (f) and the cases there cited, if pressed to their full extent, have been overruled. [Kelly C. B. I have been for fifty years under the impression that the rule of law is as laid down in *Bidgood v. Way*, which has stood unshaken for nearly a century.] At any rate the difficulty which occurred in that case as to the doctrine of intendment and the form of pleading does not occur in the present. In nearly all the cases relied upon by the other side, except a few decided before the law was settled, there was an actual possession of the subject matter by the wife during coverture. [Kelly C. B. Suppose a married woman has a separate account in her own name at a bank and her father pays money into it, the husband may at any moment go to the bank and assert his right to the money: but must the husband join his wife in bringing an action against the banker to recover it? *Cleasby* B. Before that question is answered, must it not be known whether the money was paid by the father as agent for the wife? *Channell* B. Suppose a husband and wife have separate accounts at the same bank and the husband dies, would it be necessary for the wife to take out administration to the husband?] If the wife has a separate account with the assent of the husband it would be her account as agent of her husband. [Kelly C. B. Suppose the wife opens a separate account without the knowledge of her husband and a stranger

(a) *Moor.* 887.(c) 8 *De G. M. & G.* 258.(e) 3 *Exch.* 136.(b) 1 *A. & E.* 65.(d) 12 *M. & W.* 97.(f) 2 *W. Bl.* 1236.

makes a payment into it? Again, suppose a piece of plate at a silversmith's shop is given to the wife, could husband and wife bring trover for it? *Smith J.* There the property would pass at once.]

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As to the form of pleading, the Court has power to amend. [*Kelly C. B.* You may amend in any way you like.] In *Dalton v. The Midland Counties Railway Company (a)*, which is a direct authority for the plaintiff, the action was by the wife stating herself to be the owner of the stock. If a count were introduced stating the facts, which shewed that the wife was the meritorious cause of action, the objection would still arise on the record.

Prentice, in reply, objected that in whatever way the declaration was framed the action would not lie, and cited 1 *Chitt. Pl.*, 33 5th ed., 34 7th ed., by *Greening*; *Com. Dig. Baron and Feme* (E. 3); *Holmes v. Wood* cited in *Weller v. Baker (b)*, *Messenger v. Clarke (c)*.

CLEASBY B. As there is a difference of opinion on the Bench I proceed to state mine first.

The real question is, whether this was a chose in action of *Mary Ann Ross* which her husband did not reduce into possession either during coverture or since her death. I am of opinion that it was. There is no doubt about the rule of law that marriage is an unqualified gift of all the wife's personal chattels, whether vested in her before marriage or coming into existence afterwards; *Com. Dig. Baron and Feme* (E. 3); but as regards choses in action the rule is qualified to

(a) 13 C. B. 474.

(b) 2 Wils. 414. 424.

(c) 5 Exch. 388.

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this extent, that unless her husband reduces them into possession they do not pass to him ; and this applies not only to choses in action existing before marriage, but to those also which come into existence after the marriage, as in the case of bonds and those contracts in which the wife is the meritorious cause of action. In *Co. Litt.* 351 *b.* no distinction is made between them : “if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them.” In *Brashford v. Buckingham* (a), in the Exchequer Chamber, it was held that husband and wife were rightly joined as plaintiffs in an action of assumpsit on a promise made to the wife during coverture in consideration of her services in effecting a cure. But in *Buckley v. Collier* (b) it was held that unless there was an express promise to the wife she should not be joined in an action for work done by her during coverture ; in that case the meritorious cause did not move from the wife, because the husband is entitled to the services of his wife, and they are one person. Sir *E. V. Williams* in his *Law of Executors and Administrators*, adopting the rule laid down by Lord *Hardwicke* in *Garforth v. Bradley* (c) as to choses in action of the wife, says, vol. 1, pp. 792-3, 6th ed., “Property falling under the description of *choses in action* of the wife, are debts owing to her on bond or otherwise, arrears of rent, legacies, trust funds, residuary personal estate, money in the funds, and other property recoverable by action or suit.” Another instance is a debt payable by instalments, in which there is no property or complete right until the time for payment has arrived. In the present

(a) *Cro. Jac.* 77.(b) 1 *Salk.* 114.(c) 2 *Vez.* 675, 676-7.

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case a person placed in the hands of the defendant a sum of money with a direction to appropriate part of it to the benefit of the wife: the defendant did not receive it as her agent, therefore the defendant's possession of it was not hers; she only had a right to recover it; there was no reducing of it into possession either by her or by her husband, who indeed did not know of it. This being a chose in action to be reduced into possession by action, I have come to the conclusion that the proper person to sue is the administratrix of the wife. And I am satisfied without going through the authorities that none of them are at variance with this conclusion. I will refer to two of them only. In *Bird v. Peagrum* (a), leasehold property having been settled to the separate use of the wife, she received the rents; and the savings which came into her possession were not a chose in action. In *Bidgood v. Way* (b) there is some error as to what was determined; as observed by Lord *Ellenborough* in *Ord v. Fenwick* (c), cited in note (g) to 2 *W. Bl.* 1236, 2nd edition, it did not appear "whose lands had been used and occupied, whether the husband's or the wife's." It was an action for use and occupation and for money had and received to the use of the husband and wife, on which was founded an assumpsit to both, and it was held that the latter count could not be supported, and therefore the action fell to the ground. There is also, as pointed out by *Dampier J.* in *Philliskirk v. Pluckwell* (d), cited in note (n), p. 1239, a little inaccuracy in the language of the judgment. I do not go into the question of the particular form of pleading. I read this declaration as one for money received by the defendant for the purpose of

(a) 13 *C. B.* 639.(b) 2 *W. Bl.* 1236.(c) 3 *East* 104. 106.(d) 2 *M. & S.* 393. 396.

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being paid over to the wife and which he promised to pay her.

SMITH J. The facts of the present case shew that *Mary Ann Ross* had during her coverture a chose in action which might have been, but which was not, reduced into possession by her husband. Therefore the representative of the wife is entitled to bring this action. There is a broad distinction between the cases in which money has once come into the hands of the wife, and she invests it in clothes or other articles or on some security, and those in which there is only a contract with the wife. In the former if she afterwards disposes of the articles she disposes of things not her own but her husband's. With regard to the latter, so long as the property is not reduced into possession the right survives to her on the death of her husband. That distinction is not confined to bonds and promissory notes, though they are prominently brought into notice as instances, because those instruments might be in the possession of the wife and so pass as chattels to the husband. In *Gaters v. Madeley* (a) *Parke* B. says, p. 426, "A promissory note is not a personal chattel in possession, but a chose in action of a peculiar nature; but which has indeed been made by statute assignable and transferable according to the custom of merchants, like a bill of exchange; yet still it is a chose in action, and nothing more;" and the reason is because it lies in action. He dissents from the observation of Lord *Ellenborough* in *M'Neilage v. Holloway* (b) that a promissory note might be treated as a personal chattel in possession, and adds, p. 427, "The decision in the subse-

(a) 6 M. & W. 423.

(b) 1 B. & A. 218. 221.

quent case of *Richards v. Richards* (a) has qualified that position. In that case the Court of Queen's Bench said that a promissory note was, in the ordinary course of things, a chose in action, and that there was nothing to take it out of the common rule, that choses in action given to the wife survive to her after the death of her husband, unless he has reduced them into possession." I infer from this that the common rule is that things lying in action, that is, which cannot be brought into possession without an action if the party holding them resists the claim to them, survive to the wife after the death of her husband unless he has reduced them into possession. Here the money was placed in the hands of the defendant as a gift to the wife. She did not select the defendant as her agent to receive the money, and it is only to be got at by an action, and therefore is nothing more than a chose in action. No case has been cited in which it was held that under such circumstances an action by the wife's representative will not lie. *Bird v. Peagrum* (b) illustrates the distinction between the case of property actually reduced into possession by the wife and a mere chose in action. There the wife had actually received the rents and deposited part of them with the defendant; therefore the money was reduced into possession during the coverture, and it was held that on the wife's death her husband could sue for it in his own right. It is not necessary to go through the cases, because all those relied on by Mr. *Prentice* involve the fact that the money had come into the possession of the wife or had been reduced into possession by her, or goods had been given to or had been purchased by her, and so the property in them passed at once to the husband.

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(a) 2 B. & Ad. 447.

(b) 13 C. B. 639.

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As to the difficulty in the way of recovering by reason of the pleadings, the only objection is that there is a variance between the declaration and the evidence; but in a certain sense the evidence shews that the money was received to the use of the wife, and this is the general form of pleading. The objection in *Bidgood v. Way* (a) arose on motion in arrest of judgment, and my brother *Cleasby* has given an answer to the argument based on that case. One count in the declaration was for money had and received to the use of the husband and wife, which could not be, because money received to their joint use would go at once to the husband. At any rate that case does not govern the present in point of pleading. It would perhaps be more satisfactory if there had been a special count; but Mr. *Prentice* fairly stated that his objection was that on the facts no action in any form by the representative of the wife would lie.

KEATING J. I have not had the advantage of hearing all the arguments; therefore I will only state that, so far as I have heard them, I agree that the judgment of the Queen's Bench should be affirmed for the reasons given by my learned brothers.

CHANNELL B. I have had some doubt, but upon the whole I think the judgment should be affirmed.

It is not suggested that the judgment is not correct if the assumption be true that there was a chose in action conferred on the wife, with which the husband did not during coverture interfere (b). And the grounds stated by the Court below for their judgment embrace two

(a) 2 W. Bl. 1236.

(b) See *ante*, p. 584.

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propositions: first, that there was a chose in action in the wife; secondly, that the husband did not interfere with it during the coverture. As to the second there is no dispute. The only question is, whether this was a chose in action. I do not purpose to go through the cases. They establish that if a married woman joins in an action and the fact of her coverture appears on the record the judgment will be arrested unless the record states her interest. But where the wife is the meritorious cause of action, or there is a chose in action of the wife not reduced into possession, the action by husband and wife will lie. Here money was deposited with the defendant for the benefit of the wife, and no action could be maintained against her until she assented to hold it for the wife; *Williams v. Everett (a)*; but she did assent, and therefore is liable to an action by some person. I think the husband and wife might have sued jointly; at any rate the husband might. In 1 *Williams Exors.* p. 738, 6th ed., it is said, "By the term *chose in action*, as used in this treatise, is to be understood a right to be asserted, or property reducible into possession, either by action at law, or suit in equity." I think there was in the present case such a chose in action, and which, never having been reduced into possession by the husband, survived to the wife on his death. The only difficulty which I have felt is whether, though some action might have been brought by husband and wife, an action for money had and received to the use of the wife would lie. The action for money had and received is however in the nature of an equitable remedy, and at the time this action was brought the

(a) 14 *East* 582.

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money had not been paid over but was held for the use of the wife. Further, the action by the administratrix of the wife, apart from technicalities, is brought for the benefit of the wife's estate, and I am not sure that the administratrix might not sue for this as money still held to the use of the wife. But I base my judgment on the ground that this was a chose in action of the wife not reduced into possession by the husband during coverture.

KELLY C. B. I rejoice at the conclusion to which the other members of the Court have come, because it is in accordance with justice, but I cannot conscientiously concur in it. It appears to me opposed to the first principles of the *English* law, for the consequence of this judgment is that not only a right of action, but personal property also, may belong to a wife during coverture. The proposition which lies at the root of all the cases is that a feme covert cannot in law be the owner of chattels or any other personal property; but if this action by the administratrix of the wife, whom her husband survived, is maintainable, an action must have been maintainable by herself if she had survived her husband, and that would be because the husband and wife might have sued jointly for this money. I however hold that under no circumstances which can exist or be hypothetically put is an action for money had and received maintainable by husband and wife unless the interest of the wife is specially stated. *Bidgood v. Way* (a) was an action for use and occupation and for money had and received; as regards the messuage and

(a) 2 W. Bl. 1236.

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lands the declaration was held bad because it did not appear that they were the property of the wife, in which case she would be the meritorious cause of action ; and as regards the money had and received it was held simpliciter that by the law of *England* the action was not maintainable. Some of the expressions of the Judges, p. 1239, may be open to criticism, where they say that no promise, either express or implied, gives a right of action to a married woman, for they afterwards allude to exceptions to that proposition, premising however that "they are exceptions which prove the rule ;" and then they proceed, p. 1240, " Besides, these are general damages, and the count for money had and received cannot be supported by intendment. In *Abbot and Blofield* (as reported by *Rolle*) an express promise is stated to the wife. Neither can the insertion of the wife be surplusage. It creates an interest in the wife, and entitles her to the damages by survivorship. We do not enter into the farrago of cases that may be found under the title of *joinder in action*, nor into the distinction there made between *torts* and contracts. The inclinations of the Judges, in cases of apparent hardship, have produced determinations not to be reconciled." This case has for nearly a century been held to be sound law and has been so considered in a variety of text books. In *Chitty on Pleading*, p. 33, 5th ed (*a*), the work of a very learned man, it is laid down, " In general, the wife cannot join in any action upon a contract made *during* marriage, as for her work and labour, goods sold, or money lent by her during that time." And it is remarkable that, although this action for money had and received is well known to the law, there is no case in the books in which such an

(a) Page 34, 7th ed., by *Greening*.

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action by husband and wife has ever been held to be maintainable. The same may be said of the action for money lent and upon an account stated. The exceptions referred to by the Judges in *Bidgood v. Way* (a) is probably an inaccuracy of the reporter. But there is an exception to the rule when it appears on the record that the wife is the meritorious cause of action or the action is brought upon an instrument which shews that the contract was made for her benefit. To say nothing of *Co. Litt.* 351 b., Sir E. V. Williams, in his *Law of Executors and Administrators*, vol. 1, pp. 792-3, 6th ed., points out instances of debts or sums of money owing on specific contracts, to which may be added, shares in railway stock registered in the name of the wife; all these are choses in action in which the contract does not of itself establish a right of possession in the husband and wife, but only creates a right of action in which the wife is the meritorious cause, and the thing itself can only be recovered by action. These exceptional instances appear to me to be distinct from the present case. In *Johnson v. Lucas* (b) it was held that a count for money found to be due from the defendant to husband and wife on an account stated by them was bad for want of an averment that the account was stated concerning money due to the wife in her right, or otherwise shewing her interest in the money; and this action is for money had and received to the use of the wife. Suppose it had been brought when the cause of action first accrued, the wife could not have brought the action alone, at least a plea in abatement would have put an end to it; and if she had been joined with her husband that would have been ground for arrest-

(a) 2 W. Bl. 1239.

(b) 1 E. & B. 659.

ing the judgment, according to *King v. Basingham* (a) and *Bidgood v. Way* (b). I agree that this argument is of a technical nature, but we are sitting as a Court of law and are not at liberty to set aside rules of pleading which have been long established and to give a judgment which is without precedent, I will not say at variance with the decided cases. This is not a special action of assumpsit, and it is not necessary to determine whether an action would lie if the special circumstances were stated in the declaration.

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Judgment affirmed.

(a) 8 *Mod.* 199.

(b) 2 *W. Bl.* 1236.

BAZELEY *against* FORDER.

[*Friday,*
July 3rd.]

Where a wife, living separate from her husband in consequence of misconduct on his part rendering it improper for her to remain with him, has the custody of their child under the age of seven years against the husband's will but by force of an order made under stat. 2 & 3 *Vict. c. 54.*, the reasonable expenses incurred in providing for it are part of the wife's reasonable expenses, for which she has by law authority to pledge her husband's credit. Per *Blackburn, Mellor and Lush JJ.*, *Cockburn C. J.* dissentiente.

*Wife living
apart from
husband.
Child in cus-
tody of wife.
2 & 3 Vict.
c. 54. s. 1.
Necessaries.*

THIS was an action, tried before the Secondary of London, in which the plaintiff obtained a verdict for 9*l.* 8*s.*, subject to leave to enter a nonsuit if there was no evidence proper to be left to the jury.

It appeared from the Secondary's notes that the action was brought to recover the price of necessaries in the way of clothing supplied to the child of the defendant while residing with the mother, who was living separate from her husband, the defendant. The wife, having left the husband for reasons which for the present purpose were taken to have been sufficient to justify her

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doing so, obtained from the Master of the Rolls an order under stat. 2 & 3 *Vict. c. 54.* that the child, being under the age of seven years, should be placed in her custody. Not having the means of maintaining the child the mother procured the necessaries in question for the child on credit.

In *Hilary* Term, *Bruce Campbell* obtained a rule in pursuance of the leave reserved, which was argued *January 81*, before COCKBURN C. J., BLACKBURN, MELLOR and LUSH JJ.

Horace Lloyd, for the plaintiff.—The defendant would be liable for necessaries supplied for the use of his wife; *Houlston v. Smyth* (a), in which *Best* C. J., p. 130, reflected strongly on *Horwood v. Heffer* (b). He is also liable for those supplied to her for the use of the child, who was part of her household; the support of it was a reasonable and proper part of her expenditure. [*Lush* J. In *Rawlyns v. Vandyke* (c) Lord *Eldon* said, p. 252, that where the father suffered the children to remain with their mother “he thereby constitutes her as his agent, and authorizes her to contract those debts for clothing and other necessaries; but this I think should be left to the jury.”] If the husband is not liable for these necessaries the order of the Master of the Rolls will be almost nugatory. [*Blackburn* J. Stat. 2 & 3 *Vict. c. 54. s. 1.* authorizes him to make the order “subject to such regulations as he shall deem convenient and just.”] According to the judgment of Lord *Romilly* M.R., when he made the order, the Court of

(a) 3 *Bing.* 127.

(b) 3 *Taunt.* 421. See also note to *Manby v. Scott*, 2 *Smith L. C.* 449, 6th ed.

(c) 3 *Esp.* 250.

Chancery does not consider that it has power to make regulations as to the support of a child, but only as to its education and access of the parent to it.

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Keane and *Bruce Campbell*, for the defendant.—At common law there is no obligation on the parent to support his child ; the only legal liability is under stat. 43 *El.* c. 2. s. 7. and subsequent Acts ; *Urmston v. Newcomen* (a), *Fluck v. Tollemache* (b), *Mortimore v. Wright* (c), per Lord *Abinger*. In *Rawlyns v. Vandyke* (d) Lord *Eldon*, p. 252, put the question as one of authority in fact ; here it is put for the plaintiff as an authority in law which the husband cannot revoke. Stat. 2 & 3 *Vict.* c. 54. contains no provision as to the maintenance of the child while in the custody of its mother. A special enactment, stat. 11 & 12 *W.* 3. c. 4. s. 7., was necessary to enable the Court of Chancery to make an order on popish parents to allow a fitting maintenance for their protestant children. [*Blackburn J.* An enactment in a statute passed for “preventing the growth of popery” does not throw much light on the construction of stat. 2 & 3 *Vict.* c. 54.] Further, the wife can obtain a proper allowance for her child by application to the Divorce Court under stat. 20 & 21 *Vict.* c. 85. s. 35., and the costs of such a suit are necessities ; *Rice v. Shepherd* (e). [*Mellor J.* To obtain such allowance there must be a decree for judicial separation. *Blackburn J.* And that argument might equally be used where necessities were supplied to the wife for her own use.]

Cur. adv. vult.

(a) 4 *A. & E.* 899. 905.

(b) 1 *C. & P.* 5.

(c) 6 *M. & W.* 482. 486 ; and see *Shelton v. Springett*, 11 *C. B.* 452.

(d) 3 *Esp.* 250.

(e) 12 *C. B. N. S.* 332.

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In this Vacation, there being a difference of opinion on the Bench, separate judgments were delivered.

BLACKBURN J. The judgment I am about to deliver is that of my brothers *Mellor* and *Lush* and myself.

[After stating the facts.] A wife when separated from her husband in consequence of misconduct on his part rendering it improper for her to remain with him is in the same position as if he turned her out of doors, and is by law clothed with power to pledge his credit for her reasonable expenses according to her husband's degree, unless she is in some other way supplied with the means of providing them. If therefore the plaintiff's claim here had been for reasonable apparel supplied to the wife herself or for the supply of food for her household servants, such as according to her husband's degree would be reasonable, there was sufficient evidence to be left to the jury in support of his claim to charge the husband. And the only question remaining is whether, the wife having the custody of the infant against the husband's will but by force of an order made under stat. 2 & 3 Vict. c. 54., the reasonable expenses incurred in providing for the infant are part of the wife's reasonable expenses within the meaning of the rule of law. If they are there was evidence that the defendant's wife was separated from him under such circumstances as gave her by law authority to pledge her husband's credit for them, and the verdict must stand. If they are not I do not see any legal principle on which the defendant can be made liable.

There is I believe no authority or case bearing on the point; but I think on principle that, as soon as the law became such that a wife separated from her husband

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might properly and legally have the custody of her infant children under the age of seven years though the husband objected, it became a reasonable and necessary thing that she should clothe and feed those children according to their degree. It is true that in one sense this is an expense voluntarily incurred by the wife, as she is not obliged to ask for or take the custody of her child; but I think the wife's authority in such cases is to pledge the husband's credit for her reasonable expenses though they are not such as she is obliged to incur.

The wife of the richest subject in the realm when driven from her husband's roof is not obliged to have servants or clothes suitable to her degree. If she chooses to clothe herself economically and dispense with attendance she may do so; yet I apprehend it will not be disputed that she may bind her husband by ordering clothes and hiring servants reasonably fit for her degree, and, if her husband's station be high enough to make it reasonable, ordering liveries for those servants.

All those expenses are voluntary in one sense, for if the wife chooses she need not incur them. I cannot but think that the very object of stat. 2 & 3 *Vict. c. 54.* was that a wife should not be compelled to do violence to her feelings as a mother by parting from her infant child when she was not in fault; and that when she does choose to keep her child, and is by law empowered to do so, the expenses necessarily incurred in doing so are necessary and reasonable, having reference to her station not merely as the wife of a person in the station of the defendant but as the wife properly having the custody of the infant children of the marriage.

It is argued that if this be so the liability of the

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father is changed, for a father's legal obligation to support his child is not more than to supply such food and clothing as are necessary for health, whilst if there is any authority given by law to the wife it is to pledge the husband's credit for such necessities for the child as may be reasonable with reference to the husband's station. This is true, but the same remark applies to the wife: a husband whilst his wife resides with him chooses his own style of life, at least in theory. In the quaint language of *Hide J.* in *Manby v. Scott*, in the Exchequer Chamber (*a*), if "the wife will have a velvet gown, and a satin petticoat, and the husband thinks mohair, or farendon for a gown, and watered tabby for a petticoat, is as fashionable, and fitter for his quality," who is to decide the controversy? Not the wife, nor a jury it may be consisting of drapers and milliners, but the husband. But when the husband has without cause turned his wife out of doors, or by his own fault rendered it impossible for her to reside with him, the rule is changed. The husband is no longer the sole judge of what is fit, but the law gives the wife in such a case authority to pledge his credit for her reasonable expenses, leaving it to be determined by others what is reasonable. This increase of the husband's liability only comes into play when he is in fault, and so is not unjust. I think the increased liability incurred in respect of the wife having the custody of the children falls within the same principle, and therefore I think that this rule should be discharged.

COCKBURN C. J. I am compelled in this case to differ from the rest of the Court.

(a) 1 *Mod.* 124. 138.

[After stating the facts.] It is now well established that, except under the operation of the poor law, there is no legal obligation on the part of a father to maintain his child, unless indeed the neglect to do so should bring the case within the criminal law. Civilly, there is no such obligation. "It is a clear principle of law," says *Parke B.* in *Mortimore v. Wright* (a), "that a father is not under any legal obligation to pay his son's debts; except, indeed, by proceedings under the 43 *Eliz.*, by which he may, under certain circumstances, be compelled to support his children according to his ability; but the mere moral obligation to do so cannot impose upon him any legal liability." It is clear that if the child had been living in the father's family the father would not have been liable for necessities supplied to it by a third party on his omitting to provide them. A fortiori there would be no such liability where the child was living, against the father's will, with another person. Can it make any difference that the child is living, equally against the father's will, with the mother? If both mother and child were living as part of the father's family the wife would not have authority to pledge the husband's credit for necessities supplied to the child contrary to the husband's will. Can she do it the more because she and the child are living apart from him?

It is admitted that there is no direct liability in the father in respect of articles supplied on credit as necessary to the child; but it is said that articles thus supplied for the use of the child may be treated as necessities to the mother. The difficulty I have in adopting this view arises from the fact that there is no

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(a) 6 *M. & W.* 482. 488.

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obligation on the part of the mother to take the child at all. It is on the petition of the mother that an order is made as to the custody of the child under stat. 2 & 3 *Vict. c. 54*. It is optional with the mother to apply for such an order. And, though it is true that a married woman separated from her husband may under such circumstances as the present incur expenses, as necessary to the degree and means of the husband and herself, which, if she were living in the husband's household, it would be in his power to refuse her, I cannot see any analogy between things which are necessary to the degree and station of the wife and the expense incidental to the maintenance of a child; the keeping of such child by the mother instead of leaving it with the father not being so far as I can see in any sense a thing necessary to the mother.

The fact is that a case has arisen for which the law has not made provision. It does not seem to have occurred to the Legislature on passing stat. 2 & 3 *Vict. c. 54*. that there might be cases in which a mother to whom the custody of a child was committed under the statute might not have the means of supporting it. It does not appear to me that we can properly supply the defect by extending the fiction of law, that a wife leaving her husband for sufficient cause but against his will is armed by him with authority to pledge his credit for necessaries, to the case of necessaries supplied to a child. That fiction was resorted to owing to a defect of our law in not affording to a married woman, though deserted by her husband, or compelled by his conduct to quit his roof, any means of compelling her husband to provide for her, unless she proceeded for a divorce *à mensâ et thoro* and obtained alimony. Under a system of law more perfectly and

completely dealing with the relation of husband and wife, a Court having cognizance of matters relating to this relation would have authority to afford redress to a married woman under the circumstances referred to even without an application for a divorce or judicial separation. If the law were in this respect what it should be the question as to provision to be made by the father for children properly in the custody of the mother would be taken into consideration and fixed by competent authority. I do not think that we can meet the case now arising from want of legislation on the subject by straining the law relating to the liability of a husband for necessities supplied to a wife living apart from him so as to make it embrace necessities supplied to a child for which, if the child were living with him, he would not be liable. In doing so it seems to me that we should be legislating to meet a case in which the law is insufficient. This I think we cannot properly do, and I am therefore of opinion that the rule should be made absolute, but my learned brothers being of a different opinion the rule will be discharged.

Rule discharged.

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ALDOUS *against* CORNWALL.

Friday,
July 3rd.

1. The addition to a promissory note of words which cannot prejudice any person does not destroy its validity.

2. The words "on demand" were added to a promissory note without the knowledge of the maker, after it had been delivered to the payee. Held, that the maker was not discharged from his obligation to pay it, as the words only added what the law would have supplied.

*Promissory
note.
Alteration by
payee.
Addition of
words which
cannot preju-
dice.*

THIS was an action by the payee against the maker of a promissory note expressed to be payable on demand. The plea denied the making of the note.

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On the trial, at the *London* Sitzings after *Trinity* Term, 1867, before the late Mr. Justice *Shee*, it was proved that the words "on demand" were added without the knowledge of the defendant after the note had been delivered to the plaintiff. It did not appear who made the alteration, but it was assumed to have been made by the plaintiff, and no question was raised as to this fact. The learned Judge directed a verdict for the plaintiff, reserving the point whether by such an alteration the note was rendered void.

In *Michaelmas* Term, *Joyce* obtained a rule nisi accordingly on the ground that a material alteration had been made in the note after it was given.

The rule was argued in this Term, *June* 9: before COCKBURN C. J., BLACKBURN and LUSH JJ.

Finlay shewed cause.—The old authorities which say that an immaterial alteration of an instrument while in the hands of the holder of it vitiates it apply to a deed; *Pigot's Case* (a), *Master v. Miller* (b). The law as to promissory notes and bills of exchange is that their validity is not affected by an addition which has no effect, according to the maxim *Utile per inutile non vitiatur*; *Catton v. Simpson* (c); nor by an alteration made in furtherance of the original intention of the parties; *Byrom v. Thompson* (d); unless made in a material part without the consent or knowledge of the maker or acceptor; *Burchfield v. Moore* (e), *Gardner v. Walsh* (f). Here the alteration was immaterial, and,

(a) 11 Co. 26 b.

(b) 4 T. R. 320; affirmed on error, 5 T. R. 367; 2 H. Bl. 140; 1 Smith L. C. 796, 6th ed.

(c) 8 A. & E. 136.

(d) 11 A. & E. 31.

(e) 3 E. & B. 683.

(f) 5 E. & B. 83.

assuming that it was made by the plaintiff, it does not affect the note, or render it less capable of being sued on. If no time of payment be expressed, the instrument is payable on demand; *Whitlock v. Underwood* (a), *Byles on Bills*, 204, 9th ed.

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Roland Vaughan Williams, contra.—The alteration of an instrument by the addition of effective words, if made while in the custody of the person entitled to sue upon it, whether made by him or not, vitiates it, because the alteration causes it no longer to be the same instrument; *Master v. Miller* (b), per *Grose J.* In that case the rule laid down in the second resolution in *Pigot's Case* (c) as to the alteration of deeds was extended to bills of exchange. [*Blackburn J.* The instrument may have been in the custody of a person and yet the alteration may not have been made by him.] In *Master v. Miller* (b), though the special verdict found that the alteration was made by some person or persons unknown, it was assumed that the plaintiff either made or assented to it because he sued upon the bill in its altered form. In *Davidson v. Cooper, in error* (d), Lord *Denman*, delivering the judgment of the Court, said, p. 352, "The strictness of the rule on this subject, as laid down in *Pigot's Case* (c), can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to." [*Blackburn J.* In *Davidson v. Cooper, in error* (d),

(a) 2 B. & C. 157.

(b) 4 T. R. 320. 345.

(c) 11 Co. 26 b.

(d) 13 M. & W. 343.

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the alteration changed the whole character of the instrument. *Lush J.* 'Suppose the holder of a note payable "two months after date" drew his pen through those words and wrote over them the day on which it was due?'] In that case there would be no intention to alter the effect of the note; if there is such an intention it is immaterial whether the alteration does so or not: in the present case it must be admitted that the alteration does not. [*Lush J.* Is there any state of things in which the alteration made in this note would affect the parties?'] It would be competent to the defendant to shew that the note sued upon was delivered as an escrow; *Davis v. Jones (a)*, per *Jervis C. J.*; and if a plea to that effect were pleaded, it would be more difficult for the defendant to prove it in the teeth of the words added to this note than in the teeth of the legal presumption that the note operated from delivery. *Calvert v. Baker (b)* and *Birchfield v. Moore (c)* shew that the alteration, to vitiate a bill of exchange, need not materially affect the acceptor. [*Blackburn J.* It is sufficient that it alters the legal effect of the instrument, though it benefits the acceptor; *Gardner v. Walsh (d)*.] In *Mollett v. Wackerbarth (e)* the rule in *Pigot's Case (f)* was applied to a contract for the sale of goods; there an alteration had been made by the buyer in the sold note without the knowledge or consent of the sellers, and it was held that if it could affect the buyer's rights in any respect it would avoid the contract though it left the duty to be performed by the sellers unchanged. *Whitlock v. Underwood (g)* decided that a note which had no

(a) 17 C. B. 625. 634.

(b) 4 M. & W. 417.

(c) 3 E. & B. 683.

(d) 5 E. & B. 83.

(e) 5 C. B. 181.

(f) 11 Co. 26 b.

(g) 2 B. & C. 157.

date was payable on demand within the Stamp Act,
55 G. 3. c. 184.

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COCKBURN C. J. The case has been extremely well
argued on both sides.

Cur. adv. vult.

LUSH J. now delivered the judgment of the Court.
[After stating the facts and the rule nisi as ante,
pp. 608-9.] No objection having been made to the
pleadings we must consider the case as if the ques-
tion had been properly raised on the record. It was
admitted, and properly so, on the argument that the
addition of the words "on demand" did not alter the
legal effect of the instrument, but only expressed what
the law would otherwise have implied. But it was con-
tended, upon the authority of *Pigot's Case* (a) and *Master*
v. Miller (b), that the alteration having been made by
the payee and holder, though in a matter not material,
avoided the instrument. In *Pigot's Case*, it is said, fol.
27 a., "If the obligee himself alters the deed by any of
the said ways," (viz., "by interlineation, addition, rasing,
or by drawing of a pen through a line," &c.), "although
it is in words not material, yet the deed is void: but if
a stranger, without his privity, alters the deed by any
of the said ways in any point not material, it shall not
avoid the deed." For this proposition 2 *Dyer* 9 *Eliz.*
fol. 261 b., is cited. *Shepp. Touch.*, vol. 1, p. 68, is to
the same effect. It was found as a fact in *Pigot's*
Case (a) that the alteration there, which was not a
material one, was made by a stranger, and judgment
was given for the plaintiff, so that the case itself is
not a decision upon the point in question. *Master v.*

(a) 11 Co. 26 b.

(b) 4 T. R. 320; affirmed in error, 5 T. R. 367; 2 H. Bl. 140.

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Miller (a) extended the doctrine as regards material alterations to bills of exchange, and subsequent cases have applied it indiscriminately to all written instruments whether under seal or not (see *Davidson v. Cooper* (b)). No authority was cited, nor are we able to find any, in which the dictum has been acted upon and an instrument held to be avoided by an immaterial alteration.

There are cases to the contrary, though we cannot regard them as entirely satisfactory. Thus, in *The Lord Darcy and Sharpe* (c), an alteration in a bond not material, made by the executor of the obligee, was held not to vitiate the bond. There the Court seemed to lay stress on the fact that the alteration was in favour of the obligor. In *Sanderson v. Symonds* (d) the holder of a policy of insurance on a ship for a voyage to the coast of *Africa* during her stay there and back to *Liverpool*, with liberty to "touch and stay at any ports or places . . .; to sell, barter, and exchange goods, and load, unload, and reload goods at any or all of the ports and places she may call at," fearing that these words might not be sufficiently extensive for his purpose, had caused the words "and trade" to be inserted in the risk; several of the underwriters had initialed the alteration, but the defendant refused to do so on the ground that he never underwrote trading policies to *Africa*, and he offered before the loss to cancel his subscription and return the premium rather than assent to such an alteration. The plaintiff refused to accept this offer

(a) 4 *T. R.* 320; affirmed in error, 5 *T. R.* 367; 2 *H. Bl.* 140.

(b) 11 *M. & W.* 778, 800-2; affirmed in error, 13 *M. & W.* 343.

(c) 1 *Leon.* 282.

(d) 1 *B. & B.* 426; *S. C. nom. Sanderson v. Symons*, 4 *Moo.* 42.

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and held to the policy. The ship was afterwards lost, and the plaintiff sued for his subscription, and the defendant resisted the action on the ground that the alteration avoided the policy so far as he was concerned. It is to be observed here that both parties thought the alteration material at the time it was made. The Court however held that the words so added expressed no more than was already contained in the policy as signed by the defendant, and therefore that the defendant was not discharged.

This case might have been cited as conclusive upon the question before us but for the reasons assigned by the different members of the Court for their judgment. *Dallas* C. J. said, 1 *B. & B.* 430, that the rule "was not intended so much to guard against fraud, as to insure the identity of the instrument and prevent the substitution of another, without the privity of the party concerned. But the present case," he continued, "stands on its own circumstances. The instrument in question is a policy of insurance, an instrument signed by a number of individuals wholly unconnected in interest, and between whom no privity can exist. Indeed it has never been contended that this was an alteration without the privity of the party, and the old cases turn entirely on alterations without the privity of the party: here, the instrument was shewn to all the parties concerned; those who put their initials to the alteration, thereby expressed their consent to it; those, who refused to do so, expressed their denial by the absence of their initials. But the latter were bound by the policy as it stood at first, the former by the policy in its altered shape." *Park* J. said, 1 *B. & B.* 431, "In all the cases on policies the Court refers to the materiality of the alteration; . . .

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The alteration here is immaterial, the risk stands as it stood before, and the writing immaterial words does not vacate the policy." And *Burrough* and *Richardson JJ.* based their judgments on the fact that the risk was not varied by the alteration. Had the alteration in that case been a material one, the fact that some of the underwriters had assented to it and that it had been shewn to those who refused their assent would not have prevented the operation of the rule as against the latter. This had been decided in the prior cases in the same Court, *Langhorn v. Cologan* (a) and *Fairlie v. Christie* (b), in each of which the dissentient underwriters had been held to be discharged by a material alteration in the policy, though they had been asked and had refused to join others who had assented. The judgment of *Dallas C. J.* therefore cannot stand upon that ground, and it is obvious that the real ground of the decision in *Sanderson v. Symonds* (c) was that the defendant was not and could not be prejudiced by the alteration. Why the Court should have limited the doctrine they there laid down to policies of insurance it is not easy to understand. We cannot discover any reason for making a distinction between that and any other species of contract.

Another case is that of *Catton v. Simpson* (d), in this Court. There the defendant and the plaintiff as surety for him had given a joint and several promissory note. The payee having pressed the defendant for payment consented to give time on his procuring a third person to add his name to the note. The plaintiff, who afterwards paid a moiety of the amount, sued the defendant

(a) 4 *Taunt.* 330.(c) 1 *B. & P.* 426.(b) 7 *Taunt.* 416.(d) 8 *A. & E.* 136.

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for repayment, and it was objected that as the name of the third person had been added without the plaintiff's consent he was discharged and had paid the money in his own wrong. *Patteson* J., who tried the cause, directed a verdict for the plaintiff, and the Court refused a rule for a new trial, holding that it "was not an alteration of the note, but merely an addition which had no effect." It is true that in the subsequent case of *Gardner v. Walsh* (a) this Court expressly overruled *Catton v. Simpson* (b), not however on the ground that an immaterial alteration vacated the instrument, but on the ground that the alteration was a material one.

This being the state of the authorities, we think we are not bound by the dictum in *Pigot's Case* (c) or the authority cited for it; and, not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one destroys the validity of the note. It seems to us repugnant to justice and common sense to hold that the maker of a promissory note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written. We therefore discharge the rule.

Rule discharged.

(a) 5 E. & B. 83.

(b) 8 A. & E. 136.

(c) 11 Co. 26 b.

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[Friday,
July 3rd.]

*Public Health
Act, 1848,
11 & 12 Vict.
c. 63. ss. 10.
88.*

*Local Act.
Provisional
order.*

*Repeal of
rating clauses.
Alteration in
rating.
Railway.*

The NORTH EASTERN Railway Company, appellants, The Mayor, Aldermen and Burgesses of TYNEMOUTH, being the Local Board of Health for that Borough, respondents.

A portion of the borough of *T.*, consisting of the township of *N. S.* and parts of the townships of *T.*, *P.* and *C.*, was under the management of Commissioners constituted under a Local Act. In 1849 the townships comprising the parliamentary borough of *T.* were incorporated, and the powers of the Commissioners transferred to the Corporation pursuant to The Municipal Corporations Act, 5 & 6 W. 4. c. 76. s. 75. In 1851 the General Board of Health made a provisional order under The Public Health Act, 1848, 11 & 12 Vict. c. 63., which repealed the rating clauses of the Local Act, enlarged the area of that Act, and extended its unrepealed provisions over the whole of the municipal borough of *T.* Also it applied sect. 88 of The Public Health Act, 1848, except so much of it as provided that a railway and certain other property should be rated on one fourth only of its annual value, the effect of which was to subject those parts of the line of railway which were not in the township of *N. S.* to a rating at full value. The order was confirmed by stat. 14 & 15 Vict. c. 103. "so far as" it was authorised by The Public Health Act, 1848. Held,

1. That it was within the power of the Board to repeal the rating clauses of the Local Act, enlarge its area, and extend its unrepealed provisions over the whole of the borough. But,

2. That the order was not authorized by sect. 10 of The Public Health Act, 1848, as it altered the provisions of that Act with respect to rating different descriptions of property.

IN two general district rates for the borough of *Tynemouth*, in the county of *Northumberland*, the appellants were rated upon the full annual value of such part of their railway as lies in the township of *Tynemouth*, and upon two thirds of the annual value of that part which lies in the township of *Clinton*, including in each case the stations, dwelling houses, warehouses, sheds and the other adjuncts of a railway. Notice of appeal having been given, a special case was stated for the opinion of this Court under stat. 12 & 13 Vict. c. 45. s. 11.

A portion of the borough of *Tynemouth*, consisting of the township of *North Shields* and of a part of each of

the townships of *Tynemouth*, *Preston* and *Clinton*, was before the making of the provisional order after mentioned under the management of Commissioners constituted under stat. 9 *G.* 4. *c.* xxxvii., “for paving, lighting, watching, cleansing, regulating, and improving the town of *North Shields*, in the county of *Northumberland*.” The appellants, in accordance with sects. 74, 75 and 80 of that Act, were from time to time rated by the Commissioners upon the full improved yearly value of their lands and premises, including their railway within the limits of the Act.

In 1849 the parliamentary borough of *Tynemouth* was by Royal charter created a municipal corporation under the provisions of stat. 5 & 6 *W.* 4. *c.* 76., and shortly afterwards the Commissioners acting under the Local Act duly transferred their powers to the Corporation of *Tynemouth* in accordance with stat. 5 & 6 *W.* 4. *c.* 76. *s.* 75.

In 1851 a provisional order purporting to be an order under the provisions of The Public Health Act, 1848, 11 & 12 *Vict.* *c.* 63. *s.* 10., was made by the General Board of Health, and this order was confirmed by stat. 14 & 15 *Vict.* *c.* 103. *s.* 1. “so far as” it was authorised by The Public Health Act, 1848. After reciting the Local Act and the transfer of the powers of the Commissioners to the Corporation of *Tynemouth*, and that it appeared to the General Board to be expedient that The Public Health Act, except as thereafter mentioned, should be applied to the borough and its boundaries so defined as aforesaid, and that provision should be made with respect to the local Act and the partial repeal thereof, it was ordered, sect. 2, “that from and after the passing of any Act of Parliament confirming the order The Public Health Act,

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1848, and every part thereof, except the section numbered 50, and except so much of sect. 88 as provides that the occupier of any land used as arable, meadow, or pasture ground only, &c., or as a railway, constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in one fourth part only of such net annual value thereof, shall apply to and be in force within and throughout the entire area, places and parts of places comprised within the boundaries of the borough of *Tynemouth*, so fixed as aforesaid, and that the corporate borough and places and parts of places shall be and constitute one district for the purposes of The Public Health Act accordingly." The order, sect. 5, repealed the rating clauses, sects. 74, 84, of the Local Act, and sect. 13 extended its unrepealed provisions over the whole municipal borough; and ordered, sect. 14, that "all houses, buildings, yards, gardens, lands, tenements and hereditaments in the township of *North Shields*, and all detached houses not forming part of a street, and all lands occupied solely as gardens or for the purpose of husbandry, shall be rated and assessed only upon two thirds of the full net annual value;" and re-enacted the exemption of charity and other lands which were exempted by the Local Act.

The question for the opinion of the Court was, whether the appellants could legally be rated or assessed to rates or assessments imposed by the respondents under their powers as the Local Board of Health for *Tynemouth* in respect of so much of their lands as were used only as a railway, exclusive of stations, dwelling houses, warehouses, sheds and the other adjuncts of a railway as distinguished from the railway itself, otherwise than in the proportion of one fourth part only of the full net annual value thereof so ascertained as aforesaid.

By stat. 9 G. 4. c. xxxvii. s. 74. the Commissioners were to rate and assess "the tenants or occupiers of all houses, buildings, yards, gardens, lands, tenements and hereditaments in the township of *North Shields*, and of all detached houses not forming part of a street, and of all lands occupied solely as gardens or for the purposes of husbandry within the limits of this Act, in any sum not exceeding 1s. 4d. in the pound; and the tenants or occupiers of all other houses, buildings, tenements and hereditaments within the limits of this Act (save and except any houses, buildings and other hereditaments occupied for the purposes of public charity, and also all public school rooms, &c.), in any sum not exceeding the sum of 2s. in the pound, according to the yearly value of such respective premises as the same are or shall at the time of the making of such rate or assessment be respectively rated to and for the relief of the poor."

Sect. 75 provided for the rating of churches, chapels, meeting houses, and places for religious worship, and churchyards and meeting house yards situate on the sides of or forming part of any of the streets, lanes, or other public passages or places within the limits of the Act.

Sect. 80 enacted that if the rate for the relief of the poor should not be deemed an unfair or unequal criterion, the Commissioners were to make the rates or assessments "in any sum not exceeding 1s. 4d. in the pound upon the full improved yearly value of all houses, buildings, yards, gardens, lands, tenements and hereditaments in the township of *North Shields*, and of all detached houses not forming or being part of a street,

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and of all lands occupied solely as gardens, or for the purposes of husbandry, and in any sum not exceeding 2s. in the pound upon the full improved yearly value of every other house, building, tenements and hereditaments within the limits of this Act (except as aforesaid).”

The Public Health Act, 1848, 11 & 12 *Vict. c. 63* s. 10. “If, after such inquiry or further inquiry as aforesaid it appear to the said General Board of Health to be expedient that this Act or any part thereof should be applied to the city, town, borough, parish or place with respect to which inquiry has been made, upon the petition of such inhabitants as aforesaid, and within the same boundaries as those of such city, town, borough, parish or place, and within which there is no local Act of Parliament in force for paving, lighting (otherwise than for the profit of proprietors or shareholders), cleansing, watching, regulating, supplying with water, or improving such city, &c., or any part thereof, or in anywise relating to the purposes of this Act, they shall report to Her Majesty accordingly; and at any time after presentation of such report it shall be lawful for Her Majesty, by and with the advice of Her Privy Council, to order that this Act or any part thereof shall be applied to and be put in full force and operation within such city, &c.; and if after such inquiry or further inquiry as aforesaid it appear to the said General Board to be expedient that this Act or any part thereof should be put in force within boundaries not being the same as those of the city, &c. from which the said petition proceeded, or within boundaries where no petition has been presented from such inhabitants as aforesaid, or

within any city, &c. in which any such Local Act of Parliament as aforesaid is in force, they shall make a provisional order under their hands and seal of office accordingly, with such provisions, regulations, conditions, and restrictions with respect to the application and execution of this Act or any part thereof, and with respect to any such Local Act, and the repeal, alteration, extension, or future execution of the same, and in all respects whatsoever as they may think necessary under all the circumstances of the case."

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Sect. 88. "The said special and general district rates shall be made and levied upon the occupier (except in the cases hereinafter provided) of all such kinds of property as by the laws in force for the time are or may be assessable to any rate for the relief of the poor, and shall be assessed upon the full net annual value of such property ascertained by the rate (if any) for the relief of the poor made next before the making of the respective assessments under this Act;" . . . "Provided also, that the occupier of any land used as arable, meadow or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water, or used only as a canal, or towing path for the same, or as a railway, constructed under the powers of any Act of Parliament, for public conveyance, shall be assessed in respect of the same in the proportion of one fourth part only of such net annual value thereof."

The Local Government Act, 1858, 21 & 22 *Vict.* c. 98., which by sect. 4 is to be construed together with and deemed to form part of The Public Health Act, 1848, by sect. 55 repeals sect. 88 of that Act, and

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enacts that the general district rates shall be made and levied upon the occupiers of all kinds of property which are assessable to the poor rate, and shall be assessed upon the full net annual value thereof; but re-enacts the proviso in sect. 88 of The Public Health Act, 1848, in favour of railways.

The case was argued in this Term, *June 3*: before COCKBURN C. J., BLACKBURN, MELLOR and LUSH JJ.

Manisty (*Raymond* with him), for the respondents.—
 First. In the rating clauses of the Local Act, 9 G. 4. c. xxxvii., there was no distinction between railways and any other kind of property, and the General Board had, under stat. 11 & 12 Vict. c. 63. s. 10., power to alter the Local Act subject to their order being confirmed by Parliament; their order might dispense with the reduced scale of rating prescribed by sect. 88 of the latter Act. In *Clayton v. Fenwick* (a) the provisional order which was held to be not authorised by stat. 11 & 12 Vict. c. 63. dealt with a matter in no way relating to the purposes of that Act.

Secondly. The General Board might have applied stat. 11 & 12 Vict. c. 63., excepting the whole of sect. 88, and retained the rating clauses of the Local Act; the result of which would have been the same as the present state of things.

Kemplay (*Mellish* with him), for the appellants.—
 First. The General Board might under sect. 88 of stat. 11 & 12 Vict. c. 63. have repealed the Local Act;

(a) 6 E. & B. 114.

Turner v. The Mayor of Halifax (a), and have applied stat. 11 & 12 *Vict. c. 63.* to the whole of the muni-

(a) TURNER, appellant, The Mayor, Aldermen and Burgesses of HALIFAX, being the Local Board of Health for that borough, respondents.

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THE case was argued in *Michaelmas* Term, November 16, 20, 1867, before COCKBURN C. J. and MELLOR J. (SHEE J. left the Court before the close of the argument on November 16,) by Maule (*Hannay* with him) for the respondents; Mellish (*Kemplay* with him) for the appellants.

They cited *Tait v. The Carlisle Board of Health* (b), *Luscomb*, appt., *The Plymouth Board of Health*, respondents (c), *Clayton v. Fenwick* (d), *Reg. v. Heath* (e).

Cur. adv. vult.

COCKBURN C. J. now delivered the judgment of the Court.

This was a case stated for the opinion of this Court upon the following facts.

By a Local Act, 4 *G. 4. c. xc.*, "for paving, lighting, cleansing, watering and improving the township of *Halifax*, &c.," trustees appointed under the Act were by the 99th section empowered, for the purpose of raising money to carry into execution such of the purposes of the Act as related to the improvement and regulation of the township, to raise and levy rates, not exceeding 2s. 6d. in the pound upon the annual rent or value of rateable property in the township, such annual rent or value to be from time to time settled, ascertained, and fixed in such manner as the trustees should direct. Then follows in the 101st section a proviso which gives rise to the present contest, namely, "that the mills, messuage, lands and hereditaments, with the appurtenances, the estate of the Marchioness of *Hertford* and in the occupation of *John Hodgson*, shall be charged and rated at one third only of the full rate or assessment for the time being to be levied by virtue of this Act."

In 1848 the parliamentary borough of *Halifax*, comprising the whole of the township of *Halifax* and parts of the adjoining townships of *Northowram* and *Southowram*, was by Royal Charter created a municipal Corporation under the provisions of stat. 5 & 6 *W. 4. c. 76.*, and thereupon the trustees then acting under the Local Act 4 *G. 4. c. xc.* duly transferred their powers to the Corporation of *Halifax*, in accordance with the 75th section of stat. 5 & 6 *W. 4. c. 76.*

In 1851, by a provisional order of the General Board of Health, confirmed by stat. 14 & 15 *Vict. c. 103.*, the provisions of The Public

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Monday,
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(b) 2 *E. & B.* 492.

(d) 6 *E. & B.* 114.

(c) *E. B. & E.* 691.

(e) 7 *B. & S.* 285.

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cipal borough, so that there should not be two bodies having co-ordinate powers within the district. But this

Health Act, 1848, were, with the exception of the 50th section, applied to the borough of *Halifax*. The same order repealed, with the exception of certain sections, the previous Local Act, 4 G. 4. c. xc. Among others it repealed the 99th section, which gave the power of levying rates. But it left unrepealed the 101st section, which as before stated secured to the property therein specified the privilege of being assessed only at two thirds of its value.

Other Local Acts have since been passed. In 1853 an Act was passed for the improvement of the borough of *Halifax*, the principal objects of which were first to give powers to the Corporation to procure a better supply of water, and to erect waterworks for that purpose, giving them authority for this purpose to levy water rates proportioned to the rental of houses, and secondly to place the market under the management of the Corporation, and to enable them to build a new market and levy market tolls.

In 1858 another Act, 21 & 22 *Vict. c. xci.*, was passed, authorizing the Corporation to maintain and regulate the Park recently given by Mr. *Francis Crossley* to the borough, and to provide public baths in the Park, and for making a cemetery, and for making further provision with respect to the waterworks and the improvement of the borough, and for other purposes. Parts of the Act were to be executed by the corporation, and others by the Local Board. Rating powers were provided by the Act.

In 1862 another Improvement Act, 25 & 26 *Vict. c. xli.*, was passed, extending the powers of the Corporation and Local Board, and giving further powers of rating.

Lastly, in 1865, an Act was passed for extending the boundaries of the municipal borough and district of *Halifax*, and otherwise improving the borough, and to amend and extend the Acts relating thereto. By this Act the Acts applicable to the former borough and district are applied to the enlarged area, and by this Act again rating powers are conferred.

Since the order for applying The Public Health Act, 1848, came into operation, the rating powers under the former Local Act having been taken away, rates have been levied within the borough under The Public Health Act, 1848, and The Local Government Act, 1858.

In the four rates recently made, viz., a borough rate, a general district rate, a special district rate, and an improvement rate, the property occupied by the appellants, being part of the property protected by the 101st section of stat. 4 G. 4. c. xc., was assessed at its full value instead of two thirds of its value. Hence the present appeal.

provisional order, which partially incorporates sect. 88 of stat. 11 & 12 *Vict. c. 63.*, leaving out the proviso in

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On the argument before us it was contended, on behalf of the respondents, that as the order of the General Board of Health, applying The Public Health Act, 1848, to the township and borough of *Halifax*, had omitted to repeal the 101st section of the Local Act, that section must be taken as ingrafted on The Public Health Act, 1848, and as qualifying, in favour of the occupiers previously privileged under that section, the rating power given by The Public Health Act, 1848. It was further urged that the 88th section of The Public Health Act, 1848, and the corresponding section of The Local Government Act, 1858, section 55, which provides that where "any kind of property" within a district has, previously to the application of the Act, been exempt from rating by a Local Act, such exemption shall continue, must be taken to apply to such a case as the present.

The latter argument was met, and we think sufficiently met, by reference to the case of *Tait v. The Carlisle Board of Health* (a), in which it was held that the words of these sections applied only to the species or description of property, and not to its locality. A fortiori, this would be so where the exemption was as in the present case in respect of property belonging to a particular individual.

The argument as to the implied annexation of the 101st section of stat. 4 G. 4. c. xc. to The Public Health Act, 1848, was met on the part of the respondents by adverting to the enlarged area of the district, and the far wider scope and purpose of the present taxation as compared with that provided for by former Acts, whence it was to be inferred that the Legislature could not have intended on the creation of new powers to continue an exemption which had been established when the area and purpose of the local taxation was so much more limited.

We do not attach much weight to this reasoning. If the effect of the omission to repeal the 101st section by the order putting The Public Health Act, 1848, in force, was to incorporate that section in The Public Health Act, 1848, as applicable to the borough, so as to operate as a proviso on the general rating power; inasmuch as The Local Government Act, 1858, is to be read with The Public Health Act, 1848, and all the subsequent Local Acts refer to and are as it were based upon The Public Health Act, 1848, the same qualification would attach to the rating powers throughout, and the privilege given by the 101st section would continue. But after a careful examination of all these Acts, which certainly constitute an intricate and entangled jungle of legislation,

(a) 2 E. & B. 492.

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favour of railway and certain other property, alters the mode of rating prescribed by that Act, and is the making of a new enactment not applying that Act to the borough. The power to apply part of that Act was intended to be exercised by keeping alive the Local Act with such alterations as were required under the altered circumstances.

Further, the Local Act did not extend to the whole area which is constituted a district under stat. 11 & 12 *Vict.* c. 63.

Manisty, in reply.

Cur. adv. vult.

which it is most painful to wade through, we have come to the conclusion that though the 101st section is not in terms repealed it is virtually annulled by the repeal of the 99th section of the Local Act, which gave the power of rating, and that there is nothing in any of the Acts in question which revives it. The exemption conferred by the 101st section of stat. 4 *G. 4.* c. xc. is confined to rates directed to be levied "*by virtue of the said Act.*" But no rates are now levied by virtue of that Act. The rating powers conferred by it are gone. Though some of the rates levied under the later Acts, General or Local, are applicable to the purposes of the former Local Act, as to those which are not, as for instance the borough rate, the question of exemption could not arise at all. Yet even the former are no longer levied in any sense by virtue of the Local Act. The omission to repeal the 101st section may perhaps fairly lead to the inference that the intention of those who framed the order of the General Board of Health was to preserve the privilege given by that section intact; but if such was the intention means have not been taken to give effect to it.

We must deal with this complicated and imperfect legislation as we find it; and for the reasons we have given we are of opinion that the 101st section of stat. 4 *G. 4.* c. xc. has become inoperative, and consequently that this assessment has been rightly made. The rates will therefore be confirmed.

But we think the question was one which the appellant was, under the circumstances, well warranted in raising, and therefore that there should be no costs.

Rate confirmed, without costs.

LUSH J. now delivered the judgment of the Court.

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The rate appealed against is assessed upon the full annual value of such part of the appellants' railway as lies in the township of *Tynemouth* and upon two-thirds of the annual value of that part which lies in the township of *Chirton* (including in each case the stations, dwelling houses, warehouses, sheds and the other adjuncts of a railway), and the appellants contend that they are entitled to the benefit of the proviso to the 88th section of The Public Health Act, 1848 (11 & 12 *Vict. c. 63.*), and to have so much of their road as consists merely of the railway assessed in one-fourth of the annual value, notwithstanding that the provisional order declares that such proviso shall not apply to the borough of *Tynemouth*. The contention is that that part of the order is ultra vires. It is hardly necessary to say that if it is, it is not rendered valid by stat. 14 & 15 *Vict. c. 103. s. 1.*, inasmuch as that enactment only confirms the provisional order "so far as" it is authorized by The Public Health Act, 1848.

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Before proceeding to consider the terms of The Public Health Act, 1848, which confer the authority on the Board to make provisional orders, it is desirable to bring clearly to view the alterations which the provisional order proposes to effect.

By the 74th section of the Local Act, 9 *G. 4. c. xxxvii.*, which, as appears from the case, extended over the township of *North Shields* and part of each of the townships of *Tynemouth*, *Preston* and *Chirton*, the occupiers of all lands, &c., in *North Shields*, of all detached houses not in a street, and of all gardens and lands used for husbandry throughout the district, were liable to be assessed to an annual rate in any sum not

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exceeding 1*s.* 4*d.* in the pound, and the occupiers of all property other than the above (except schools, &c.) in any sum not exceeding 2*s.* in the pound. There is nothing in the Act which required that the several properties should be rated in the proportions above indicated. It was only in the event of maximum rates being imposed that the property in *North Shields*, detached houses, gardens, &c., had any preference. Up to that point each might have been assessed at its full annual value.

The appellants' railway, not being in *North Shields*, was, up to the passing of stat. 15 & 16 *Vict.* c. 103., rated at its full value.

The provisional order, sect. 5, repeals the 74th section of the Local Act altogether; and this was clearly within the power of the Board; stat. 11 & 12 *Vict.* c. 63. s. 10.; *Turner v. The Mayor of Halifax* (a). It also enlarged the area of the Local Act and extended its unrepealed provisions over the whole municipal borough of *Tynemouth*; and this also was within the competence of the Board. This is the extent to which it "repeals, alters and extends" the Local Act so far as concerns the question before us. And if it had then done no more than "apply" the 88th section of the General Act, the consequence would have been that the stations, dwelling houses, &c., would have been separately rateable at their full annual value, but the line of railway with the sidings, turntables, and so much of the platform as was to be considered as the side of the railway (*The South Wales Railway Company*, appts., *The Swansea Board of Health*, respts. (b)), would have been rateable at only one-fourth of such value.

(a) See p. 623 note (a).

(b) 4 *K. & B.* 189.

But the order, while it “applies” the 88th section to the borough, excepts so much of that section as favours railways and canal property, and by sect. 14 orders that all houses, buildings, yards, gardens, lands, tenements and hereditaments in the township of *North Shields*, and all detached houses not forming part of a street, and all lands occupied solely as gardens or for the purpose of husbandry, shall be rated and assessed only upon two-thirds of the full net annual value, and re-enacts the exemption of charity and other lands which were exempted by the Local Act, thus subjecting those parts of the line of railway which are not in the township of *North Shields* to a rating at full value contrary to the terms of the 88th section of the General Act.

The authority of the Board of Health is given by the 10th section of stat. 11 & 12 *Vict. c. 63.*, and it is in these terms :—“If after such enquiry or further enquiry as aforesaid it appear to the said General Board to be expedient that this Act or *any part thereof* should be *put in force* within any city, town, borough, parish, or place in which any such Local Act of Parliament as aforesaid is in force, they shall make a provisional order under their hands and seal of office accordingly, with such provisions, regulations, conditions, and restrictions, with respect to the application and execution of this Act or any part thereof, and with respect to any such Local Act, and the repeal, alteration, extension, or future execution of the same, and in all respects whatsoever as they may think necessary under all the circumstances of the case.”

Is such a severing of the 88th section justified as a “putting in force,” or, to use the term which is employed in the earlier part of the 10th section as denoting the same

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thing, as “applying a part of this Act to the borough”? We think not. The 88th section fixes the proportion in which certain descriptions of property shall contribute towards the expenses of the sanitary measures contemplated by the Act, and it must be supposed according to the amount of benefit to be derived from these measures, and although the stipulation in favour of railways, canals, &c., is put in the form of a proviso, it is in substance an exception. The section says in effect that the occupiers of all property except canals, railways, arable, meadow and pasture ground, &c., shall be rated at full value, and the excepted properties at one-fourth of such value.

To say that the excepted properties shall be rated at full value or at two-thirds their value is not to “apply” or “put in force” the Act or any part of the Act, but to make a new and substantially different enactment materially altering the rights of parties in the district to which the Act is applied. It appears to us that the Board have no more power to make this alteration in the Act than they have to order that rates which the Act says shall be paid by the occupier shall not be paid by the occupier but by the owner. Is it then warranted by the general words which follow? What these words were intended to include is not clear; as observed by *Coleridge J.* in *Clayton v. Fenwick* (a), they “are so general that they must receive some limitation.” Whatever they may have been intended to mean, it seems obvious they did not mean to give such a power as this, for while the word “alteration” is inserted with reference to dealing with the Local Act, no such word is found with reference to the General Act.

(a) 6 E. & B. 114. 131.

It was contended in the argument that the order, construed as a whole, amounted to no more in effect than the perpetuating the 74th section of the Local Act, 9 G. 4. c. xxxvii., and preserving the rights given by that section. We cannot accede to this view. If the 74th section remained in force no more than 2s. in the pound could have been assessed in one year on so much of the railway as lies within the area of that Act, and for aught we know the rates under the order may exceed this amount.

Upon the different effect of the two sections, the 74th of the Local Act and the 14th of the order, we have already observed. But even this argument applies only to *North Shields*. The substantial objection remains that the properties beyond that limit, which by the General Act are assessable at one-fourth, are by the order rateable at full value.

For these reasons we are of opinion that the rates are bad and must be amended.

Rates to be amended.

ROLLE, appellant, WHYTE, respondent.

Thursday,
May 28th.

[Reported ante, pp. 306. 315.]

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June 5th, 1868.
[Wednesday,
February 3rd,
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IN THE EXCHEQUER CHAMBER.

MORTON and others *against* Woods and others.

*Mortgagor
and mortgagee.
Part owner.
Attornment by
equitable mort-
gagor in pos-
session.
Mortgage
deed creating
tenancy but
not executed
by mortgagees.
Term of years,
subject to
power of re-
entry without
demand of
possession.
Tenancy by
estoppel.
Registration
of Bills of
Sale, 17 & 18
Vict. c. 36.*

B., in consideration of advances from his bankers, conveyed to them two pieces of ground by a deed reciting that one portion was already mortgaged in fee upon trusts for the sale of the land and application of the purchase money; and as a further security for the principal and interest for the time being due from him in respect of the advances, he "attorned and became tenant" to the bankers, their heirs and assigns, at and from the date of the deed, of such of the premises thereby conveyed "as was or were in his occupation for and during the term of ten years, if that security should so long continue, at and under the yearly rent of 800*l.*, to be paid yearly on every 1st *October* in every year, the first yearly rent to be paid and payable on the 1st *October* then next, provided that notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants, their heirs, executors, administrators or assigns, before or after the execution of the trusts of sale therein contained, to enter into and upon the mortgaged premises or any part thereof, and to eject *B.* and any tenant or person claiming or to claim under him therefrom, and to determine the term of ten years, notwithstanding any lease or leases that might have been granted by him." This deed was not executed by the mortgagees, the bankers, but *B.* continued his exclusive occupation of the premises until the mortgagees distrained upon them for arrears of rent. No rent had ever been paid. Held, by the Court of Queen's Bench and affirmed by the Exchequer Chamber,

1. That the non-execution of the deed by the mortgagees was no objection to the right to distrain, as the effect of the deed was to create not a term of years but a tenancy at will, to which *B.* had assented by attorning and continuing to occupy the premises.

2. That after having attorned and continued so to occupy he could not object that the deed shewed that he and his mortgagees had only an equitable interest in part of the premises mortgaged, or deny that the relation of landlord and tenant subsisted between himself and the mortgagees.

3. That the deed was not void as against the assignees in bankruptcy of the mortgagor for want of registration as a bill of sale under stat. 17 & 18 *Vict. c. 36.*

THIS was an action for the recovery of 939*l.* 11*s.* 2*d.*, damages for the seizure under a distress warrant of certain chattels alleged by the plaintiffs to be their property as creditors' assignees of *John Brown*, junior, a bankrupt; and by the consent of the parties a case without pleadings was stated for the opinion of the Court.

John Brown, junior, was devisee in trust, under the will of *John Brown*, senior, with *Lancelot Brown* and *W. H. Jolly*, and, subject as in the will expressed, entitled in fee to one moiety of certain hereditaments situate at *South Hylton*, in the county of *Durham*, including the *Rivet Manufactory*, which was on the 12th *September*, 1866, and thence until the date of his bankruptcy, in his occupation. Prior to and at the date of the mortgage to *F. Horn*, after mentioned, he was seised in fee of certain other hereditaments, also situate at *South Hylton*, called the *Rolling Mills*, which also were on the 12th *September*, 1866, and thence until his bankruptcy in his occupation.

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By indenture dated the 30th *May*, 1865, and made between *John Brown*, junior, of the first part, *Lancelot Brown* of the second part, and *F. Horn* of the third part, in consideration of 1500*l.* to *John Brown* by *F. Horn* then paid, *John Brown* released and conveyed to *F. Horn* and his heirs a certain piece or parcel of ground and hereditaments in the indenture particularly described, situate at *South Hylton*, including the *Rolling Mills*, to the use of *F. Horn*, his heirs and assigns, for ever, subject to a proviso for redemption and with the power of sale in the indenture contained. *Lancelot Brown* joined in this deed as surety for his brother *John Brown* and not otherwise.

At the time of the execution by *John Brown*, junior, of the indenture of the 12th *September*, 1866, after mentioned, and for some time previously, he banked with the defendants, who are bankers carrying on business in copartnership at *Newcastle* and *Sunderland* under the style or firm of "*Woods & Co.*"

On the 8th *September*, 1866, *John Brown*, junior, who was then indebted to the defendants on the balance of

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his banking account in a sum of about 1300*l.*, applied to them to make further advances to the extent of 1800*l.* to enable him to carry on his business, which they agreed to do on the terms specified in the following memorandum :—

“ 8th *September*, 1866.

“ Memorandum. In consideration of Messrs. *Woods & Co.* this day agreeing to advance me to the extent of 1800*l.*, I agree to execute to them a mortgage on my freehold land, rolling mills, machinery, fixtures, plant and premises at *South Hylton*, subject to a present mortgage of 1500*l.* to *F. Horn*, and also on all my estate, share and interest in the rivet manufactory near to the above premises and on the entirety of the machinery therein ; such to be for securing the above advance and all moneys due or to become due from me to the said Messrs. *Woods & Co.* on my account with them, or on my bills of exchange or on any other account whatsoever. Such mortgage to contain absolute powers of sale and an attornment as tenant, at the rent of 800*l.* per annum payable in advance, and all other usual clauses. Interest at the usual rate charged by Messrs. *Woods & Co.* This security to be a continuing security notwithstanding any change in the firm by death, change of partners or otherwise.

“ Witness my hand,

“ *John Brown, junior.*”

After the memorandum was signed and delivered, and before the execution of the indenture of the 12th *September*, 1866, the defendants in pursuance and on the faith of the terms of the memorandum made further advances to *John Brown, junior*, to the amount of 1649*l.* 10*s.* or thereabouts, in part of the sum of 1800*l.* so agreed to be advanced by them.

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By indenture dated the 12th *September*, 1866, and made between *John Brown*, junior, of the first part, and the defendants of the second part: after reciting, among other things, the indenture of mortgage dated the 30th *May*, 1865, and an indenture of further charge to *F. Horn* of 1000*l.* upon the premises included in the last mentioned mortgage dated the 6th *July*, 1866, and also reciting that two several sums of 1500*l.* and 1000*l.* were still due on the recited securities, but all interest thereon respectively had been paid to the last current day of payment; and also reciting that under the last will and testament of *John Brown*, senior, late of *South Hylton*, *John Brown*, junior, subject as in the will expressed, was entitled in fee to one undivided moiety of all the real estate devised by the will, except a certain dwelling house therein mentioned, and including in such real estate the Rivet Manufactory; and also reciting that part of the real estate of the testator devised by the will, and which part included the Rivet Manufactory, had by agreement and arrangement with the trustees and other parties beneficially interested in the will been for some time and then was in the exclusive possession of *John Brown*, junior, who carried on the trade of a rivet manufacturer thereon, and that all the machinery and plant of every description on the Rivet Manufactory were the exclusive property of *John Brown*, junior; and also reciting that *John Brown*, junior, being indebted to the defendants on the balance of his banking account with them, had in order to induce them to forbear taking proceedings at law against him to recover such balance and to continue their dealings with him, contracted to give

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them such mortgage or security as thereafter appearing: in consideration of the premises and also in consideration of 10s. paid by the defendants to *John Brown*, junior, he did thereby appoint, grant, release, convey and confirm to the defendants (amongst other things), first, all that piece of ground and hereditaments, including the Rolling Mills, therein particularly described, being the hereditaments comprised in and conveyed to *F. Horn* by the indenture of mortgage of the 30th *May*, 1865, and secondly, all that undivided moiety and all other share, beneficial estate and interest of *John Brown*, junior, of and in the Rivet Manufactory and all other real estate devised by the will of the testator (except the dwelling house), and also the entirety of the machinery both fixed and moveable, and all engines, boilers, cranes and other fixtures, articles and plant in and upon the rivet manufactory then or thereafter to be in the occupation of *John Brown*, junior, to have and to hold the land, hereditaments, puddling furnaces, rolling mills, machinery, manufactories and all other the premises thereinbefore described and thereby intended to be granted, assured or otherwise conveyed, with their appurtenances, unto the defendants, their heirs, executors, administrators and assigns, according to the different natures or tenures thereof respectively, upon trust that they (the defendants) should either immediately or at any time or times thereafter sell and absolutely dispose of the several hereditaments and all other the premises described and granted, assured or otherwise conveyed, and should apply the purchase money to arise from such sale in manner therein mentioned: and, as a further security for the principal and interest moneys for the time being due from *John*

Brown, junior, under or by virtue of that indenture, *John Brown*, junior, did thereby attorn and become tenant to the defendants, their heirs and assigns as and from the date thereof of such of the hereditaments and premises thereby granted or otherwise conveyed as was or were in his occupation, for and during the term of ten years, if that security should so long continue, at and under the yearly rent of 800*l.*, to be paid yearly on every 1st *October* in every year, the first yearly rent to be paid and payable on the 1st *October* then next, provided that, notwithstanding anything therein contained and without any notice or demand of possession, it should be lawful for the defendants, their heirs, executors, administrators or assigns, before or after the execution of the trusts of sale therein contained to enter into and upon the mortgaged premises or any part thereof, and to eject *John Brown*, junior, and any tenant or person claiming or to claim under him therefrom, and to determine the term of ten years, notwithstanding any lease or leases that might have been granted by him.

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The indenture of the 12th *September*, 1866, the recitals of which were to be taken as true (so far as the facts therein stated were not shewn to have been varied), was executed by *John Brown*, junior, on the day of the date thereof, but it was at the date of making the distress after mentioned and still was unexecuted by or on behalf of *Woods & Co.*, and had never been registered as a bill of sale or otherwise. It was executed by *John Brown*, junior, in pursuance of the memorandum of the 8th *September*, 1866, and on the execution thereof, the defendants made him further advances amounting, with the advances made by them between the giving

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of the memorandum and the execution of the indenture to a sum exceeding the sum of 1800*l.*, mentioned in the memorandum.

After his execution of the indenture until and at the time of making of the distress after mentioned, *John Brown*, junior, continued his exclusive occupation both of the Rivet Manufactory and of the Rolling Mills.

In the beginning of *October*, 1866, *John Brown*, junior, found himself in such pecuniary difficulties as to be unable to carry on his business any longer, and suspended payment, and by a circular dated the 16th *October*, a meeting of his creditors was convened and was held on the 19th *October*; but prior to the making of the distress he had committed no act of bankruptcy, unless the execution by him of the indenture of the 12th *September*, 1866, was such.

On the 15th *October*, 1866, the defendants, by *W. R.*, their bailiff, distrained certain goods and chattels, which at the time of such distress were on the rivet works and the rolling mills respectively, for 800*l.*, being one year's rent, which under the indenture of the 12th *September*, 1866, accrued due on the 1st *October*, 1866. At the time when this distress was made there was due to the defendants from *John Brown*, junior, on the security of the indenture of the 12th *September*, 1866, a sum considerably exceeding the sum for which the distress was made.

The warrant authorizing the distress, together with the notice of distress and the schedule of chattels so distrained, as well as the indentures before mentioned and the memorandum after mentioned, were to be taken as part of this case.

On the 25th *October*, 1866, *John Brown*, junior, filed a declaration of insolvency, and on the 23rd *November*, 1866, he was adjudicated a bankrupt on a creditor's petition. The acts of bankruptcy upon which the adjudication was based were the execution of the indenture of the 12th *September*, 1866, and the declaration of insolvency; but this was not to be taken as any admission that the execution of the indenture of the 12th *September*, 1866, was an act of bankruptcy.

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The plaintiffs were appointed creditors' assignees under such bankruptcy.

Pursuant to a memorandum of agreement made the 20th *February*, 1867, the plaintiffs paid to the defendants the sum of 939*l.* 11*s.* 2*d.* for rent and costs of distress, such payment having been made under protest and solely to get rid of the defendants' distress, and without prejudice to any proceedings which the plaintiffs might take for the recovery of such sum, the plaintiffs therein declaring their intention to dispute the validity of such distress in such manner as they should be advised.

On payment of this sum the defendants withdrew from possession of the distrained chattels, and the plaintiffs afterwards sold them.

The question for the opinion of the Court was, whether the distress made by or on behalf of the defendants was legal and valid.

Manisty (*Shield* with him), for the plaintiffs.—First. As the defendants did not execute the mortgage deed of the 12th *September*, 1866, the term of ten years was never created, and therefore there was no power to distrain for the rent which was to issue out of the property

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during the intended term ; *Swatman v. Ambler* (a). The intention was that the mortgagor should be tenant to the mortgagees for a term of ten years determinable by the mortgagees upon a contingent event ; but that intention was never carried out. It is the same as if the power to determine the tenancy were contained in a separate deed. [Cockburn C. J. Suppose a lessee at the end of a term instead of holding over says to his lessor, allow me to remain tenant and I will pay the same rent as under the lease, and the landlord gives no answer, could he not distrain for the next rent?] A demise at a fixed rent is necessary to support the right to distrain ; *Dunk v. Hunter* (b). [Lush J. The deed here did not create a term of ten years in the mortgagor, but only a tenancy at will, the mortgagor paying rent for ten years if allowed to remain in possession so long and the mortgage debt were not discharged. Cockburn C. J. *West v. Fritche* (c) disposes of this point.] There the mortgagors had the legal estate, and the relation of landlord and tenant was created by the attornment of the mortgagors to the mortgagee and payment of rent. [Blackburn J. The case is very briefly reported ; but the payments were payments of interest on the mortgage deed. Why is not a lease created though the lessor has not executed the deed ? May not this operate as a release under the Statute of Uses ?] There is no person seised to uses. By stat. 8 & 9 Vict. c. 106. s. 2. all corporeal tenements and hereditaments as regards the conveyance of the immediate freehold are deemed to lie in grant as well as in livery.

Secondly. There was no right to distrain on the

(a) 8 Exch. 72.

(b) 5 B. & A. 322.

(c) 3 Exch. 216.

Rolling Mills, in which, as appears from the Schedule, was the greater part of the property distrained. At the time of the execution of the mortgage deed of the 12th *September*, 1866, the mortgagor was only entitled to the equity of redemption, and therefore could not convey a legal reversion, so that there is neither express power to distrain nor one incident to the reversion. And the fact of the mortgagor having only the equity of redemption appears on the face of the deed, and therefore the mortgagor is not estopped from denying that the mortgagees have a reversion. The plaintiffs cannot be heard to prove what is contrary to the recitals in the deed; *Pargeter v. Harris* (a). In *Cuthbertson v. Irving* (b), affirmed in error (c), the lease did not disclose that the lessor had only an equitable interest. [Cockburn C. J. referred to *Jolly v. Arbuthnot* (d).] In that case Lord Chelmsford C., reversing the decision of Sir John Romilly M. R. (e), held that a tenancy was created between a receiver of the Court of Chancery and the mortgagor, because there was the consent of the mortgagee, who had the legal estate.

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Thirdly. The deed of the 12th *September*, 1866, was void as against the plaintiffs, being assignees in bankruptcy, for want of registration as a bill of sale under stat. 17 & 18 *Vict. c. 36*. [Cockburn C. J. It is void only as a bill of sale. *Mellish*, contra.—And there is nothing to shew that the goods distrained were chattels or taken under a bill of sale.]

Mellish (*Kemplay* with him), for the defendants.—

(a) 7 Q. B. 708.

(b) 4 H. & N. 742.

(c) 6 H. & N. 135.

(d) 4 De G. & J. 224.

(e) 28 L. J. Chanc. 274.

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First. The intention of the parties to the deed of the 12th September, 1866, was that there should be a tenancy at will only; and, that being created, there was a right of distress; *West v. Fritche* (a). It makes no difference that in that case the mortgage deed did not affect to create a term. [He also cited *Doe d. Garrod v. Olley* (b), *Co. Litt.* 55 a., *Com. Dig. Estates by Grant* (H 1).] [Blackburn J. In *Sugden on Powers* 722, 8th ed., it is said, "A lease granted under a power, like every other estate so raised, takes effect as if it were contained in the instrument containing the power," citing *Whitlock's Case* (c).]

Secondly. As to the objection that it appears on the face of the deed that the mortgagor had previously mortgaged the rolling mills, and therefore had not the legal estate to convey to the defendants, parties may create an estate by wrong; and here, the mortgagor having had actual occupation as tenant, is estopped by matter of fact, which is of a higher nature than estoppel by the recital in an instrument. In *Dancer v. Hastings* (d) a lease, under which the plaintiff in replevin held, described W. as receiver appointed by the Court of Chancery, and the rent was made payable to him or any future receiver, it was held that W. was estopped from disputing the tenancy. In *Jolly v. Arbuthnot* (e) Sir John Romilly M. R. distinguished *Dancer v. Hastings* (d) on the ground that the person distrained on had accepted a lease from the receiver of the Court of Chancery simpliciter; but Lord Chelmsford points out that it appeared from the report in 12 *Moore* that the lease "set out the

(a) 3 *Exch.* 216.(b) 12 *A. & E.* 481.(c) 8 *Co.* 69 b.(d) 12 *Moo.* 34; 4 *Bing.* 2.(e) 4 *De G. & J.* 224. 238-9.

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title of the lessor as receiver appointed by the Court of Chancery, and made the rent payable to the lessor or any future receiver or receivers, shewing thereby most clearly that the lessor had no interest in the land." In *Evans v. Mathias* (a) it was held that a lease by a receiver of the Court of Chancery did not operate as a lease by the real owner. The cases cited on the other side do not touch the present. In *Swatman v. Ambler* (b) the demise was of tolls, which are an incorporeal hereditament. *Pargeter v. Harris* (c) involved a point of pleading; while *Cuthbertson v. Irving* (d), affirmed in error (e), is rather in favour of the defendants.

Shield, absente *Manisty*, by leave of the Court, in reply.—As to the necessity of a legal reversion or an estoppel to that effect or equivalent to it, he cited *Greenaway v. Hart* (f). The report of *Dancer v. Hastings* (g) is unsatisfactory. [Cockburn C. J. It is so.] According to *Com. Dig. Estates by Grant* (H 1, H 2), this was a tenancy at sufferance. [Blackburn J. In such a tenancy no rent is ever reserved.] It was not a tenancy at will; it was not determinable at the will of the bankrupt, for he could not determine it unless he paid off the mortgage.

COCKBURN C. J. When this case is cleared from the cloud of legal erudition which has been raised we are able to do justice between the parties without contravening any rule of law.

(a) 7 E. & B. 590.

(b) 8 Exch. 72.

(c) 7 Q. B. 708.

(d) 4 H. & N. 742.

(e) 6 H. & N. 135.

(f) 14 C. B. 340.

(g) 12 Moo. 34; 4 Bing. 2.

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The first class of objections to the distress arises from the non-execution of the deed by the defendants, who, being mortgagees, distrained for rent, and it is twofold. In the first place it is said that the relation of lessor and lessee, or landlord and tenant, did not come into operation between the parties. As to that, *West v. Fritche* (a) is an authority to shew that although a deed of this description is not executed by the mortgagee, yet, if the mortgagor has attorned and occupied as tenant after execution of the deed by him, the relation of landlord and tenant is created. In the next place it is said that by this deed it was intended to create a term of ten years, and that this intention fails by reason of the deed not having been executed by both parties, and therefore the rent reserved cannot be distrained for. But, assuming that it was intended to create such a tenancy, a deed is not required where the tenancy does not extend beyond three years. The argument that this was only a tenancy at sufferance is plausible. There can however be no doubt that it was a tenancy at will, for, although the attornment was to operate for ten years if the security should not sooner cease by payment of the debt, the mortgagor did not bind himself to continue tenant for that term; he could get rid of his tenancy by paying off the principal, and the mortgagees were empowered to turn the mortgagor out at any time without any formal notice. That is to all intents and purposes a tenancy at will, and therefore does not require the execution of a deed to create it.

The second objection is, that as a portion of the premises included in the mortgage deed, and on which the distress to a considerable extent was made, consisted of

(a) 3 *Exch.* 216.

land and other property already subject to another mortgage, the legal estate being outstanding in other persons, the mortgagor had only an equity of redemption, and therefore he had no legal estate to grant to the mortgagees; and he not having it to grant they could not take it, and therefore were not entitled to distrain. This argument, so far as it goes, is well founded, but the answer is, that, although it appears on the face of the instrument that the defendants had not the legal estate, yet after the mortgagor attorned, he and those who claim through him are estopped from denying that the relation of landlord and tenant existed so as to pass as between them the legal reversion to the mortgagees. There are indeed many instances in which a person admitted as tenant is not estopped from denying that the lessor never had title, or, if he had, that his title has been put an end to by eviction. But it is well settled that if a person takes land from another and enters into possession as tenant, and is not evicted, and the rights of the lessor are in no way altered, that person, after having enjoyed the land, is estopped from saying that the legal reversion is not in the lessor so as to entitle him to all the incidents of the reversion. Here, although the tenant was not let into possession under the defendants, he was permitted to remain in possession from the date of the execution of the deed upon the footing of being tenant; and the cases cited authorise us so to hold. In *Dancer v. Hastings* (a), where a person had taken a lease from a receiver appointed by the Court of Chancery, in whom it would be impossible to say that the legal reversion was, it was held that it

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was not competent for the lessee to deny that he was his landlord and had the reversion. And in *Jolly v. Arbuthnot* (a), where the parties had the same object as in the present case, which led to the execution of a deed, it was agreed that the mortgagor should remain in possession, but that to make the security more perfect a receiver should be appointed and the mortgagor should attorn to him, Lord *Chelmsford* held that the right to distrain flowed out of the intention of the parties and the relation of landlord and tenant created by the deed. In the present case the arrangement made was for the double purpose of enforcing the security and enabling the mortgagor as tenant to remain in possession, and the intention of the mortgagor in attorning as tenant was that for better securing the payment of interest the mortgagees should have the right to distrain. Therefore, acting on authority and on the principle laid down by Lord *Chelmsford*, our judgment must be for the defendants.

BLACKBURN J. Under this deed, which was executed only by the bankrupt, after reciting the previous mortgage, he conveyed his estate to the defendants, with a clause that he did thereby attorn and become tenant to them, their heirs and assigns, for and during the term of ten years, if the security should so long continue, at and under the yearly rent of 800*l.*, to be paid yearly on every 1st *October*: provided that, notwithstanding anything therein contained and without any notice or demand of possession, it should be lawful for them to enter into and upon the mortgaged

(a) 4 *Do G. & J.* 224.

premises and to eject therefrom him and any tenant or person claiming or to claim under him, and to determine the term of ten years. After this deed had been made, and the mortgage money paid, *Brown* continued in possession until the mortgagees entered upon the premises and distrained.

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The first question is, how did this instrument operate so as to enable the mortgagees to distrain? Clearly that was their object. The objection is that though *Brown* executed the deed the mortgagees did not; and that a term of ten years could not be created without an intimation of the will of the lessor, and that stat. 8 & 9 *Vict. c. 106. s. 3.* requires that this must be done by writing under seal. If it were intended to create a term of ten years I do not see my way to saying that the non-execution of this deed by the mortgagees would prevent it so operating. I leave that an open question. For on the construction of the instrument I come to the conclusion that the mortgagor was absolutely tenant at will to the defendants, although that tenancy might last for ten years; and therefore being for less than three years it might be created by agreement not under seal. *West v. Fritche (a)* is a distinct authority that the occupation by the mortgagor with the defendant's consent after he had executed the deed is enough to create a tenancy. In that case the mortgagor had remained in possession two years and had paid interest, but length of possession does not affect the question, and the payment of interest was not payment of rent; and the Barons of the Exchequer avoided deciding on that ground. Therefore there was in the present case a tenancy entitling the defendants to distrain.

(a) 3 *Exch.* 216.

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The second objection is that a considerable portion of the premises had been already mortgaged, so that the defendants as second mortgagees had only an equitable estate and could only convey that. And it was rightly contended that in order to support a distress there must be a demise and a legal reversion. But it is sufficient if the reversion is by estoppel and not actual. If one party is let into possession by another under an agreement that the former shall be tenant and the latter landlord, each is estopped from denying the title of the other. In answer to that it is said, that it is disclosed on the face of the instrument evidencing the agreement between the parties that there was another person in whom the legal estate was outstanding, and who might have ejected the mortgagor, but upon principle I do not see how this is an answer. The principle is, that the relation of landlord and tenant is created by estoppel, and it is not affected by a notice from the party who lets the other into possession, saying, "I tell you fairly that there is a third person who has the legal estate, and warn you that your holding is precarious, but still you are my tenant." Here was no change of occupation under the defendants, but a continued occupation under them, which comes to the same thing. This principle was acted on in *Dancer v. Hastings* (a) and *Jolly v. Arbuthnot* (b), which last is a stronger authority, because Lord *Chelmsford* reversed the decision of the Master of the Rolls: see p. 243.

MELLOR J. I think that upon the true construction of this deed the object of the parties was that *Brown* should become tenant to the mortgagees for ten years,

(a) 12 B. Moo. 34; 4 Bing. 2.

(b) 4 De G. & J. 224.

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but taking the whole together it did not create a term of ten years, for the tenancy was subject to the power of the mortgagees to enter at any moment and turn the mortgagor out of possession. Therefore the mortgagor had no greater estate than a tenant at will. Under ordinary circumstances the mortgagor becomes tenant at will to the mortgagee, but that alone is not sufficient to give the mortgagee a right to distrain: to support that right there must be a rent, and in the present case there is a fixed rent.

The second objection is, that as to part of the property there is no legal reversion in the defendants by reason of the deed being an assignment of a second mortgage. But, looking to the doctrine of estoppel and the foundation of it, that objection fails. The foundation of that doctrine is the actual obtaining possession of property by one party from another, and the remaining in possession with his permission. The rule of law is, that in that state of things the former cannot turn round and say that the latter had no title to put him in possession. This however does not prevent the party from shewing that the title of his landlord has expired, or that he has been turned out of possession by superior title.

LUSH J. I am glad to find that there is no legal difficulty in carrying out the intention of the parties. If they intended to create a term exceeding three years, as the mortgagor only executed the deed and there was no payment of rent the distress would have failed. But if they intended to create a term less than three years, the assent of the parties without a deed would

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amount to a demise, and the right of distress would be incident. Now, though it was contemplated that the tenancy might last for ten years, it was not intended that the mortgagor should have a term certain; he was to remain tenant at the will of the mortgagees, binding himself to pay them rent for a term not exceeding ten years, so long as the mortgagees should allow him to remain in possession. That being the manifest intention, the acting upon it is sufficient to make the mortgagor tenant according to the terms of the deed.

The next objection is, that the distress was partly on the premises in respect of which the mortgagees had only an equitable title and no reversion, and that that fact appearing on the face of the deed prevents the doctrine of estoppel from being applied. But this argument proceeds on a misapprehension of that doctrine. A person to whom land has been let is, so long as he holds it, in the same position as if his lessor had title, and cannot be heard to say his lessor has no legal title. In the present case the mortgagor did not go out of possession and receive possession again from the mortgagees; but that ceremonial was not necessary, because he attorned to the defendants. Therefore I think that the distress can be maintained in its entirety.

Judgment for the defendants.

The plaintiffs having brought error upon this judgment, the case was argued in *Hilary Vacation*, *February* 2, 3, 1869, and judgment given on the latter day.

Joshua Williams (*Manisty* and *Shield* with him), for the plaintiffs, argued: First. That the facts here did not create a tenancy at will, but created a term of ten years, determinable in a certain manner, either by the lessor or lessee. For this he cited *Bro. Abr. Lease*, pl. 13; *Bac. Abr. Leases and Terms for Years*, (L) 3. vol. 4, p. 836, 7th ed.; *Co. Litt.* 57 a.; *Dinsdale v. Iles* (a), *Newport's Case* (b), *Pinhorn v. Souster* (c), *Watk. Convey.* p. 2, 9th ed. [*Cleasby B.* referred to *Blunden v. Baugh* (d).] Also stat. 8 & 9 *Vict. c.* 106. s. 3., *Swatman v. Ambler* (e), *Pitman v. Woodbury* (f), *West v. Fritche* (g), *Cole on Ejectment*, 450; *Woodfall Land. and Ten.* 187, 9th ed.

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Secondly. There was here no estoppel: *Co. Litt.* 352 b., Eighth rule; *Pargeter v. Harris* (h), *Cuthbertson v. Irving* (i), *Saunders v. Merryweather* (j). And the attornment had no effect: stat. 11 *G. 2. c.* 19. s. 11., *Dancer v. Hastings* (k), *Jolly v. Arbuthnot* (l).

Thirdly. This deed was an evasion of the Act for the Registration of Bills of Sale, 17 & 18 *Vict. c.* 36. ss. 1. 7.

Kemplay, for the defendants, was not called upon.

KELLY C. B. (after a full statement of the facts). Although the objections to the defendants' right to distrain are of a highly technical nature, we are bound

(a) 2 *Lev.* 88; *S. C. nom. Hinchman v. Iles*, 1 *Ventr.* 247.

(b) *Skin.* 423.

(c) 8 *Exch.* 138. 763.

(d) *Cro. Car.* 302.

(e) 8 *Exch.* 72. 80.

(f) 3 *Exch.* 4.

(g) 3 *Exch.* 216.

(h) 7 *Q. B.* 708. 727-8.

(i) 4 *H. & N.* 742; affirmed in error, 6 *H. & N.* 135.

(j) 3 *H. & C.* 902.

(k) 12 *Moo.* 34; 4 *Bing.* 2.

(l) 4 *De G. & J.* 224.

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to give effect to them if they are sustained by law, and the more so as we have heard an able argument from the plaintiffs' counsel, in which all the authorities, ancient and modern, bearing on the question, have been brought before us.

First. As to the objection that the defendants, not having the legal estate in them, had no legal right of distress. It is clear that they had not the legal estate, but that may be said of all lessors where there is a tenancy by way of estoppel and the lessors have no title at all. The defendants rely upon a tenancy by way of estoppel, and it becomes important to consider whether the law of estoppel is applicable. It is contended for the plaintiffs that no estoppel arises where the truth appears on the face of the instrument itself; and it certainly appears by the mortgage deed of *September* 1866, that the legal estate was outstanding in the first mortgagee. In support of this proposition several cases were cited, but when we look at the facts and the ratio decidendi in those cases none of them is directly in point. They were either actions upon covenant, where under the terms of the instrument the covenant could only be enforced by action at law, or actions of ejectment, in which it appeared that the plaintiff had not the legal estate, but that it was outstanding in another person. But even if any of the decisions or dicta which have been referred to lead to the conclusion that where the truth against which the estoppel is directed appears upon the face of the deed there can be no estoppel, that doctrine must be taken to have been overruled by the higher authority of the Lord Chancellor in *Jolly v. Arbuthnot* (a), and we are bound to defer to

(a) 4 De G. & J. 224.

it, as the decision of a Court of co-ordinate jurisdiction with ourselves. In that case there was a mortgage and an agreement that a tenancy should subsist, not between the mortgagor and mortgagee, but between the mortgagor and a receiver who was appointed under a deed bearing even date with the mortgage deed. The receiver so appointed could have no legal nor indeed equitable estate in him, and his character of receiver and the absence of any legal estate in him appeared on the face of the receivership deed. The Master of the Rolls took the view here contended for by the plaintiffs, and decided that the receiver had no right of distress. But Lord *Chelmsford* overruled that decision, and held that the circumstance of its appearing on the face of the instrument that it was a tenancy between the mortgagor and the receiver, who had no interest in the premises, did not do away with the tenancy nor the right of distress, which arose by implication of law. His Lordship said, p. 237, "It is contended that the attornment to *Aplin*" the receiver "had no operation; not by agreement, because he had no interest in the land to which it could apply—nor by estoppel, because the deed sets forth the rights and interests of all parties, and shews that *Aplin* had no reversion in the premises to which the power of distress could be incident. It appears to me, however, that the circumstance of the truth of the case appearing upon the deed is a reason why the agreement of the parties which it embodies should be carried out, either by giving effect to their intentions in the manner which they have prescribed, or by way of estoppel to prevent their denying the right to do the acts which they have authorized to be done. If attornment to a mortgagee would be good to create

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a tenancy in the mortgagor (which seems to be provided for by the 11th G. 2nd, c. 19.), why should not an attornment to a third person, with the consent of the mortgagee, operate either to create a tenancy or to estop all parties from denying that such a tenancy exists? The statement in the deed of the character with which *Aplin* was to be clothed in order to carry out the object of the parties, and the proof which it affords of his having no previous title to the land, appears to me to furnish no objection to the validity of the distress in question." His Lordship then referred to *Cornish v. Searell* (a) and *Dancer v. Hastings* (b), as supporting a tenancy between the mortgagor and the receiver. There is indeed this distinction between the case of *Jolly v. Arbuthnot* (c) and the present, that, although the mortgagor and mortgagee are parties to the transaction and the creation of the tenancy, it appears that there is a first mortgagee who is not a party to the deed; and that is relied upon by Mr. *Williams*. But when we consider the reasons of the law for the doctrine of estoppel it is manifest that it is the creation of a tenancy and the relation of the parties thence arising which creates an estoppel, and is the sole cause of the legal estate being unnecessary to support the right to distrain, and not the act of any third party in whom the legal estate is. Therefore, if we had any doubt, which we have not, we should defer to this authority; and though the defendants have not the legal estate in the lands in question, and though that fact appears from the instrument before us, we think that does not disentitle the defendants to distrain, nor

(a) 8 B. & C. 471.

(b) 12 Moo. 34; 4 Bing. 2.

(c) 4 De G. & J. 224.

affect the relation of landlord and tenant, or the incidents of that relation created by and arising out of the terms of the instrument.

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We now come to the deed itself, and have to consider the question whether there is a tenancy at all, and if so a tenancy to which the right of distress is incident. After the usual language of a mortgage deed there follows a clause which is thus stated in the case: "And, as a further security for the principal and interest moneys for the time being due from *John Brown*, junior, under or by virtue of that indenture, *John Brown*, junior, did thereby attorn and become tenant to the defendants, their heirs and assigns, as and from the date thereof of such of the hereditaments and premises thereby granted or otherwise conveyed as was or were in his occupation, for and during the term of ten years, if that security should so long continue, at and under the yearly rent of 800*l*." (*a*). Then follows the proviso that notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants at any time to enter upon the premises and determine the term. It is contended for the plaintiffs that here is no tenancy at all, and the ground on which that contention is put is that it was the intention of the parties to create a lease for ten years, and the lease, not being under seal by reason of the non-execution of the mortgage deed by the mortgagees, is void by the Statute of Frauds, 29 *Car.* 2. c. 3. ss. 1. 2. One answer to that is, that by the terms of sect. 1 such a lease, if not in writing, is not void, but has the force and effect of a lease at will only. This however was not the ground upon which the judgment

(*a*) See ante pp. 636-7.

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of the Court of Queen's Bench proceeded. It is contended for the plaintiffs that, the intention of the parties being to create a tenancy for ten years, it would be contrary to their intention to hold this to be a tenancy at will only. In support of that proposition very high authorities were cited, viz. *Brooke's Abridgment, Leases*, pl. 13, repeated in *Bacon's Abridgment, Leases and Terms for Years*, (L) 3. vol. 4, p. 836, 7th ed., where it is said, "If one makes a lease for ten years at the will of the lessor, this is a good lease for ten years certain, and the last words void for the repugnancy"; and it was argued that here the attornment was for ten years, and the proviso that the landlord might enter and determine the lease at his pleasure did not convert the lease into a tenancy at will but must be rejected as repugnant. And perhaps that might be so in an ordinary case of a lease for ten or twenty or twenty-one years between landlord and tenant. But when it appears that this is a mortgage deed, and that the tenancy or relation of landlord and tenant with a rent and power of distress reserved to the landlord were intended as a mere security for the payment of principal and interest, the rule of construction referred to does not apply. For looking at the intention of the parties to be collected from the whole of the instrument there is nothing repugnant in the proviso. The parties contemplated that the relation of mortgagee and mortgagor and consequently of landlord and tenant might subsist for ten years, that the mortgage money might remain unpaid and the interest be regularly paid during that time. Accordingly in the first instance there is the grant of a lease for ten years; but that is followed by a power for the mortgagee to enter at any time and take possession of the premises without notice

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or demand of possession. The manifest object of this proviso is that whatever might be the nominal duration of the tenancy it should be in the power of the landlord, that is, the mortgagee, whenever it was necessary to enforce the instrument, to put an end to any tenancy that might be created. We therefore think the Court of Queen's Bench were right in their construction of this deed. Taking the two portions of the clause in question together there is an attornment by the mortgagor as tenant for ten years, but the power given to the mortgagee to enter without notice or demand of possession converted the term of ten years into a tenancy at will, because he had the means at his mere will and pleasure to determine the tenancy. Therefore, considering the whole instrument together, we are of opinion that *Brown* having attorned tenant in respect of these premises to the defendants without going through the useless form of walking out of them and into them again,—having in fact derived and acquired possession under the mortgagee as his landlord, he became the tenant, and the tenancy for years was converted into a tenancy at will.

It was said that a tenancy at will cannot be created to continue beyond the lives of the immediate parties. The whole of the law on this point is based on very fine distinctions, but it seems that a tenancy at will may continue after the death of one of the parties unless the heir or legal representative should do some act to manifest his intention to determine the tenancy. It is enough to say that the circumstance of this power of entry being reserved to the defendants and their heirs does not necessarily prevent the estate in question becoming a tenancy at will.

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But if any doubt could exist as to the effect of this instrument with reference to a tenancy at will being created, the operation of the Statute of Frauds, 29 Car. 2. c. 3., puts an end to the question. For supposing, as Mr. *Williams* argued, that though it was intended to grant a lease for ten years, yet as the deed was not executed by the lessor it must be treated as a lease by parol only, still by the express terms of sect. 1 it is not absolutely void but has the force and effect of a lease at will only. Therefore, from the time of the execution of the deed or the attornment by the mortgagor, it was strictly a tenancy at will. As soon as rent was paid under the deed it would become a tenancy from year to year. In the meantime it is a tenancy at will, and then, a rent of specified amount being reserved, the lands became liable to a power of distress by the landlord.

Consequently, we hold with the Court of Queen's Bench that on the true construction of the deed, as entered into *between the parties*, this is a tenancy at will. For though the defendants did not execute the deed, it is quite enough that *Brown*, the mortgagor, executed it, and that the defendants acted on it; and it appears that, after the execution of it by *Brown*, they made the stipulated advances of money, and must be taken to have assented to and accepted the deed. That is much the same as if *Brown* had written a letter embodying all the terms in the deed, including the clause for the payment of rent, and the defendants had verbally assented to the proposal. That would have created a tenancy between the parties either by estoppel or under the operation of the Statute of Frauds.

As to the point on the Act for the Registration of Bills of Sale, 17 & 18 Vict. c. 36., it is enough to say in

the first place we have no power to draw inferences of fact, and we cannot intend that this mortgage deed was an evasion of that Act, for we are not sitting as a jury. And, looking at the instrument itself alone, if we held this to be a bill of sale within the Act we must also hold that every mortgage including chattels with a power in the mortgagee to distrain was an evasion of the Act. But that position cannot be maintained. We think this deed is not a bill of sale requiring registration within the meaning of stat. 17 & 18 *Vict.* c. 36., and the Court of Queen's Bench were quite right.

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BYLES and KEATING JJ., CHANNELL and CLEASBY BB.
concurred (*a*).

Judgment affirmed.

(*a*) *Smith* J. and *Pigott* B. were present during the first day of the argument.

The QUEEN *against* TUGWELL.

Wednesday,
June 10th.

[Reported ante, pp. 367. 380.]

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Wednesday,
May 27th.

*Criminal
lunatic.
Removal from
prison to
asylum.*

*County gaol
in borough.
Prison Act,
1865, 28 & 29
Vict. c. 128.
s. 57.*

*Jurisdiction of
county justices.*

*Order
adjudging
settlement.*

*Costs of past
maintenance.*

*3 & 4 Vict.
c. 54. ss. 1. 2.
11 & 12 Vict.
c. 42. s. 6.;
c. 43. ss. 6. 35.
26 & 27 Vict.
c. 77. s. 1.*

*Notice and
grounds of
adjudication.*

The Guardians of the BRADFORD Union, in the
Counties of WILTS and SOMERSET, appellants,
The Clerk of the Peace for the County of
WILTS and others, respondents.

Stat. 3 & 4 Vict. c. 54. s. 1. enacts, that if any person while imprisoned in any prison under sentence, &c. becomes insane, he shall be removed by warrant of the Secretary of State to an asylum, and remain there until he becomes of sound mind, whereupon if he remains subject to be continued in custody he shall be removed back to the prison, or, if the period of imprisonment has expired, he shall be discharged. Sect. 2. "In all such cases as aforesaid" two justices of the county, city, borough, or place where such person is imprisoned shall inquire into his settlement, and make an order on the parish of his settlement to pay all the charges of inquiring into his insanity, and of conveying him to the asylum, and a weekly sum for his maintenance in the asylum. Stat. 11 & 12 Vict. c. 43. s. 6. incorporates c. 42. s. 6., by which a justice of the county may act as such in a city, town or precinct having exclusive jurisdiction; sect. 35 excepting, inter alia, orders with respect to lunatics; but stat. 26 & 27 Vict. c. 77. s. 1. enacts that sect. 35 of stat. 11 & 12 Vict. c. 43. shall not controul sect. 6. By stat. 4 G. 4. c. 64. s. 48. a county gaol, though situate in a town having exclusive jurisdiction, shall be deemed to be part of the county. *L.* was convicted of felony at the *W.* county assizes, and sentenced to twelve months imprisonment in the county gaol, situate in the borough of *D.* Whilst undergoing that sentence he became insane, and on the 18th June, 1864, by an order of the Secretary of State, in pursuance of stat. 3 & 4 Vict. c. 54. s. 1., was removed to an asylum in the county of *G.* On the 28th March, 1867, two justices of the county of *W.* sitting in the borough of *D.*, the charters of which contained a non intromittant clause, made an order under sect. 2, which, after adjudging the settlement of *L.* to be in the parish of *B.* in the union of *B.*, ordered the guardians of the union to pay to the keeper of the gaol the charges of inquiring into his insanity and of conveying him to the asylum, and to the proprietor of the asylum a certain sum for his past maintenance, and a weekly sum for his future maintenance in the asylum. The order was served upon the guardians with notice and grounds of adjudication signed by the keeper of the house of correction and by the proprietor of the asylum. Held,

1. That under stat. 2 & 3 Vict. c. 54. s. 2. the order might be made after the term of *L.*'s imprisonment had expired.

2. That the justices of the county sitting in the borough of *D.* had jurisdiction to make the order.

3. Per Cockburn C. J. and Lush J.; Blackburn J. dubitante, Mellor J. dissentiente; that stat. 3 & 4 Vict. c. 54. s. 2. did not enable the justices to make an order for payment of the past maintenance of *L.* in the asylum; Blackburn and Mellor JJ. agreeing that the order was bad as to that part on account of the delay in obtaining it.

4. *Semble*, that the proprietor of the asylum was the proper person to obtain the order and sign the notice and grounds of adjudication.

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SPECIAL case stated under stat. 12 & 13 *Vict. c. 45.*
s. 11.

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H. Lewis was convicted of felony at the *Wilts Lent* Assizes in 1864, and was sentenced to be imprisoned in the house of correction for that county, situate in the borough of *Devizes*, for twelve calendar months, and whilst undergoing that sentence, in *June*, 1864, he became insane, and was by an order of the Secretary of State for the Home Department removed to a house licensed for the reception of lunatics situate at *Britton Ferry*, in the county of *Glamorgan*, in pursuance of stat. 3 & 4 *Vict. c. 54.*, and in that house he had since been confined and maintained.

The order of the Secretary of State, dated the 18th *June*, 1864, after reciting stat. 3 & 4 *Vict. c. 54. s. 1.*, proceeded, "And whereas it has been certified to me under the hands of the Rev. *A. S.* and *E. B. E.*, Esq., two justices of the peace, and under the hands of *R. M.* and *T. B. A.*, surgeons, being persons authorized as aforesaid, that *H. Lewis*, who was at a gaol delivery holden in and for the county of *Wilts* on the 24th *March*, 1864, convicted of larceny and sentenced to be imprisoned for one year in the house of correction at *Devizes* for the same, has become insane, and whereas the lunatic asylum at *Britton Ferry*, in the county of *Glamorgan*, has been recommended to me as a fit and proper receptacle for the said lunatic, and whereas it has been certified to me by two justices of the peace that they intend to make an order upon the parish of *Bradford on Avon* in which the said lunatic has been adjudged to be settled: I do hereby in pursuance of the Act of Parliament above recited authorize and direct you to cause the said *H. Lewis* to be received

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from the said house of correction into the said lunatic asylum, there to remain (maintenance for the said lunatic to be provided as aforesaid) until further order shall be made therein. And for so doing this shall be your warrant. Given, &c."

The officers of the parish of *Bradford* and the guardians of the poor of the *Bradford* Union were not informed of the lunacy of *H. Lewis* or of his removal to the asylum until *August*, 1865, when the proprietor of the asylum applied to the guardians for the expense of maintaining the lunatic up to that date. In *December*, 1856, the guardians were again applied to by the clerk of the peace for the county of *Wilts* to pay the expenses of maintaining the lunatic. On both occasions they refused to make any payment on the ground that no order had been made on them and that they were not liable to do so.

On the 28th *March*, 1867, in pursuance of stat. 3 & 4 *Vict. c. 54. s. 2.*, two justices for the county of *Wilts*, whilst sitting in the borough of *Devizes*, (the Secretary of State not having otherwise directed), made an order addressed to the guardians of the poor of the *Bradford* Union, in the county of *Wilts*, whereby, after reciting that *H. Lewis* had been removed on the 25th *June*, 1864, under an order of the Secretary of State, from the house of correction at *Devizes* to the *Britton Ferry* Lunatic Asylum, they adjudged his settlement to be in the parish of *Bradford* in the *Bradford* Union, and because it appeared that he ~~was~~ not possessed of sufficient property which could be ~~applied~~ to his maintenance they ordered the guardians ~~of~~ the union to pay from the common fund of the union to the keeper of the house of correction a certain sum being the reasonable charges for inquiring into ~~his~~ ⁱⁿ⁻ sanity and for conveying him to the asylum, and ~~also~~ ^{to}

pay to the proprietor of the asylum a certain sum, being the aggregate amount of the weekly charges for his past maintenance, and a weekly sum for his future maintenance in the asylum.

The settlement of the lunatic had not been previously adjudged.

The borough of *Devizes* is a borough with a separate commission of the peace and has a separate Court of Quarter Sessions and a recorder, and the charters contain a non intromittant clause.

The order was served upon the guardians with the notice and grounds of adjudication signed by the keeper of the house of correction and by the proprietor of the asylum, the ground being that the lunatic was born in the parish of *Bradford* in 1807.

The guardians of the union gave notice of appeal against the order to the clerk of the peace of the county, to the clerk of the peace of the borough, to the keeper of the house of correction, and to the proprietor of the asylum. And to avoid any difficulty arising from stat. 3 & 4 *Vict. c. 54. s. 4.*, which gives an appeal to the Quarter Sessions "in and for the county, city, borough or place where the matter of appeal shall have arisen," separate notices of appeal were given both to the borough and county Sessions.

The questions for the opinion of the Court were. First. Whether the order of justices was valid. Second. Whether the guardians were liable to pay the aggregate amount of the weekly charges for the past maintenance of *H. Lewis* in the asylum.

Stat. 3 & 4 *Vict. c. 54. s. 1.* enacts, "That if any person, while imprisoned in any prison or other place of confinement under any sentence of death, transportation,

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or imprisonment, or under a charge of any offence, or for not finding bail for good behaviour or to keep the peace, or to answer a criminal charge, or in consequence of any summary conviction or order by any justice or justices of the peace, or under any other than civil process, shall appear to be insane, it shall be lawful for any two justices of the peace of the county, city, borough, or place where such person is imprisoned to inquire, with the aid of two physicians or surgeons, as to the insanity of such person ; and if it shall be duly certified by such justices and such physicians or surgeons that such person is insane, it shall be lawful for one of Her Majesty's Principal Secretaries of State, upon receipt of such certificate, to direct, by warrant under his hand, that such person shall be removed to such county lunatic asylum or other proper receptacle for insane persons as the said Secretary of State may judge proper and appoint ; and every person so removed under this Act, or already removed or in custody under any former Act relating to insane prisoners, shall remain under confinement in such county asylum, or other proper receptacle as aforesaid, or in any other county lunatic asylum or other proper receptacle to which such person may be removed, or may have been already removed, or in which he may be in custody by virtue of any like order, until it shall be duly certified to one of Her Majesty's Principal Secretaries of State, by two physicians or surgeons, that such person has become of sound mind, whereupon the said Secretary of State is hereby authorized, if such person shall still remain subject to be continued in custody, to issue his warrant to the keeper or other person having the care of any such asylum or receptacle as aforesaid, directing that

such person shall be removed back from thence to the prison or other place of confinement from whence he or she shall have been taken, or, if the period of imprisonment or custody of such person shall have expired, that he or she shall be discharged.

Sect. 2 enacts, "That in all such cases as aforesaid, unless one of Her Majesty's Principal Secretaries of State shall otherwise direct, it shall be lawful for such two justices, or any other two justices of the peace of the county, city, borough, or place where such person is imprisoned, to inquire into and ascertain, by the best evidence or information that can be obtained under the circumstances, of the personal legal disability of such insane person, the place of the last legal settlement, and the pecuniary circumstances of such person; and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish where they adjudge him or her to be lawfully settled, or in case such parish be comprised in a union declared by the Poor Law Commissioners, or shall be under the management of a board of guardians established by the Poor Law Commissioners, then the guardians of such union, or of such parish, (as the case may be,) to pay on behalf of such parish, in the case of any person removed under this Act, all reasonable charges for inquiring into such person's insanity, and for conveying him or her to such county lunatic asylum or receptacle for insane persons, and to pay such weekly sum as they or any two justices shall, by writing under their hands, from time to time direct, for his or her maintenance in such asylum or receptacle in which he or she shall be con-

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fined ; and in the case of any person removed under any former Act relating to insane prisoners, to pay such weekly sum as they or any two such justices as aforesaid shall, by writing under their hands, from time to time direct, for his or her maintenance in the asylum or receptacle in which he or she is confined ; and when the place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county, city, borough, or place where such person shall have been imprisoned ; but if it shall appear, upon inquiry, to the said or any other two justices of the county, city, borough, or place where such person is imprisoned, that any such person is possessed of property, such property shall be applied for or towards the expenses incurred or to be hereafter incurred on his or her behalf, and they shall from time to time, by order under their hands, direct the overseers of any parish where any money or securities for money, goods, chattels, lands, or tenements of such person shall be, to seize so much of the said money, or to seize and sell so much of the said goods and chattels, or receive so much of the annual rent of the lands or tenements of such person, as may be necessary to pay the charges, if any, of inquiring into such person's insanity, and of removal, and also the charges of maintenance, clothing, medicine, and care of any such insane person, accounting for the same at the next special Petty Sessions of the division, city, or borough in which such order shall have been made, such charges having been first proved to the satisfaction of such justices, and the amount thereof being set forth in such order."

Stat. 11 & 12 *Vict.* c. 42., "An Act to facilitate the performance of the duties of justices of the peace

out of Sessions within *England* and *Wales* with respect to persons charged with indictable offences." Sect. 6 enacts, "That it shall be lawful for any justice or justices of the peace acting for any county at large, or for any riding or division of such county, to act as such at any place within any city, town, or other precinct, being a county of itself, or otherwise having exclusive jurisdiction, and situated within, surrounded by, or adjoining to any such county, riding, or division respectively, and that all and every such act and acts, matters and things, to be so done by such justice or justices within such city, town, or precinct, as justice or justices for such county, riding, or division respectively, shall be as valid and effectual in law as if the same had been done within such county, riding, or division respectively, to all intents and purposes whatsoever: Provided always, that nothing in this Act contained shall extend to give power to the justices of the peace for any county, riding, or division, not being also justices for such city, town, or other precinct, or not having authority as justices of the peace therein, or any constable or other officer acting under them, to act or intermeddle in any matters or things arising within any such city, town, or precinct, in any manner whatsoever."

Stat. 11 & 12 *Vict. c. 43.*, "An Act to facilitate the performance of the duties of justices of the peace out of Sessions, within *England* and *Wales*, with respect to summary convictions and orders." Sect. 6 enacts, "That such of the provisions and enactments in" *c. 42*, "whereby a justice of the peace for one county, riding, division, liberty, city, borough, or place may act for the same whilst residing or being in an adjoining county, riding, division, liberty, city, borough, or place of which he is

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also a justice of the peace, or whereby a justice of the peace for any county at large, riding, division, or liberty may act as such within any city, town, or precinct next adjoining thereto or surrounded thereby, being a county of itself or otherwise having exclusive jurisdiction, as are applicable to the provisions of this Act, shall be deemed to be incorporated into this Act, and to extend to all acts required of or to be performed by justices of the peace under or by virtue of this Act, in as full and ample a manner as if the said provisions and enactments were here repeated and made parts of this Act."

Sect. 35 enacts, "That nothing in this Act shall extend or be construed to extend to any warrant or order for the removal of any poor person who is or shall become chargeable to any parish, township, or place; nor to any complaints or orders made with respect to lunatics, or the expenses incurred for the lodging, maintenance, medicine, clothing, or care of any lunatic or insane person;" &c.

Stat. 26 & 27 *Vict. c. 77.*, "An Act to amend the law relating to the jurisdiction of justices residing or being out of the county for which they are justices." Sect. 1. "The 35th section of the principal Act" 11 & 12 *Vict. c. 43.* "shall not apply to or control the 6th section of the same Act, and such last mentioned section shall be construed as if the 35th section were not and never had been contained in the principal Act; and any acts done or orders made by justices previously to the passing of this Act which would have been valid if this Act had been passed at the respective dates of such acts being done or orders made shall be and are hereby declared to be valid accordingly."

Coleridge (Wyndham Slade with him), for the respon-

dents.—First. The order of justices was properly made under stat. 3 & 4 *Vict. c. 54. ss. 1. 2.*, though the term of imprisonment of the lunatic had expired. Sect. 1 directs that a prisoner who has been removed to a lunatic asylum shall remain there until he has become of sound mind; and sect. 2 gives jurisdiction to make the order “in all such cases as aforesaid” to any two justices of the peace of the county, city, borough or place where such person is imprisoned. In *Reg. v. Elsley (a)*, a lunatic having been conveyed to a county asylum under stat. 1 & 2 *Vict. c. 14. s. 2.*, it was held that an order adjudicating the settlement and for payment of expenses might be made at a future time by the same two justices who placed the lunatic in the asylum. Under stat. 3 & 4 *Vict. c. 54. s. 2.* the order may be made by any other two justices, and their order would necessarily be made after the lunatic had been transferred to the asylum. [*Blackburn J. Reg. v. Elsley (a)* does not touch the point whether the order may be made after the term of imprisonment has expired.] Notwithstanding the term has expired, the lunatic remains in the asylum subject to the order of the Secretary of State till he becomes sane.

Secondly. The county justices had jurisdiction to make the order while sitting in the borough of *Devizes*. The power given by stat. 11 & 12 *Vict. c. 42. s. 6.* to county justices to act as such in a borough having exclusive jurisdiction in the performance of their duties with respect to persons charged with indictable offences is extended by *c. 43. s. 6.* to the performance of their duties with respect to summary convictions and orders. And this was a matter arising in the county, for by

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(a) 15 Q. B. 1025.

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stat. 28 & 29 *Vict. c. 126. s. 57.*, which is to the same effect as sect. 48 of the repealed statute 4 *G. 4. c. 64*, “every prison, wheresoever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison.”

Thirdly. The order must include the past expenses of inquiry into the insanity of the person imprisoned and of conveying him to the asylum, and it is reasonable that it should also include the past expenses of maintenance, for time must be spent in inquiring into and ascertaining the parish of settlement.

Poland (Lopes with him), for the appellants.—First. At the time of making the order of justices, the term of the imprisonment of the lunatic having expired, he ceased to be a criminal lunatic within the meaning of stat. 8 & 4 *Vict. c. 54. s. 1.*, and was to be treated as any other lunatic.

Secondly. The county justices had no jurisdiction to make the order while sitting in the borough of *Devizes*. Stat. 11 & 12 *Vict. c. 43. s. 6.* incorporates the provisions and enactments in *c. 42. s. 6.*, by which county justices may act within any city, &c., having exclusive jurisdiction: but sect. 35 of *c. 43.* excepts orders of removal and orders with respect to lunatics; and though stat. 26 & 27 *Vict. c. 77. s. 1.* enacts that sect. 35 of stat. 11 & 12 *Vict. c. 43.* shall not control sect. 6 of the same statute, that cannot have the effect of giving jurisdiction to county justices when they are expressly excluded by sect. 6.

Thirdly. The justices had no power to order payment of the past maintenance of the lunatic in the asylum. An order operating retrospectively so as to charge the

ratepayers of a parish with the expenses of byegone years is not valid unless authorized by express words in the statute under which it is made; *Rex v. The Inhabitants of Maulden* (a), *Rex v. The Inhabitants of St. Nicholas, Leicester* (b), *Rex v. The Inhabitants of Darton* (c). Stat. 16 & 17 *Vict. c. 97. ss. 97. 98. 99.* enables the justices to make an order for reimbursement of all moneys paid for the maintenance of a lunatic in the asylum within twelve months previous to the date of the order; but by sect. 133 that statute does not affect stat. 3 & 4 *Vict. c. 54.* or any other provisions relating to criminal lunatics. There are no words in stat. 3 & 4 *Vict. c. 54. s. 2.* authorizing the justices to make an order for past maintenance; and if any such order can be made there is nothing to limit the time for which past maintenance may be ordered. Therefore the order is at all events bad as to those expenses, and must be quashed as to that part.

Fourthly. The order ought to have been obtained, and the notice and grounds of adjudication signed, by the clerk of the peace of the county. Stat. 16 & 17 *Vict. c. 97. s. 107.*, which relates to pauper lunatics, enacts that the overseers of any parish, and the guardians of any union or parish, and the clerk of the peace of any county, obtaining an order under that Act adjudging the settlement of any lunatic, shall send a copy of the order and statement of grounds to the overseers or guardians of the parish in which the lunatic is adjudged to be settled. And it has been held that the rules of procedure upon appeals against orders of removal apply to appeals against orders for the maintenance of lunatics, whether pauper or criminal; *Reg. v. The Justices of*

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Coleridge, in reply.—As to the last point, an order is not to be made on the treasurer of the county until there has been an inquiry as to the parish of settlement and it cannot be ascertained; and therefore the clerk of the peace was not the person to obtain the order and sign the notice and grounds of adjudication.

As to the order being retrospective. [*Cockburn C. J.* Can you distinguish *Rex v. The Inhabitants of Maulden (c)?*] In that case it was unnecessary that the justices should have the power of making a retrospective order, as an order for the payment of a weekly maintenance might have been made when the pauper was placed in the asylum. But stat. 3 & 4 *Vict. c. 54* contemplates the order being made after the removal of the lunatic to the asylum, when some costs of maintenance must have been incurred; and therefore the justices ought to have the power of making a retrospective order. The word “maintenance” in stat. 3 & 4 *Vict. c. 54 s. 2.* includes past as well as future maintenance.

COCKBURN C. J. Three objections are made to the validity of the order of justices: two of them are to the order as a whole; the third affects only part of it. With regard to the objections to the whole order, our decision is in favour of the respondent.

The first objection is, that the order was made after the term of imprisonment to which the lunatic was sentenced had expired. The facts lie within a short

(a) 13 *Q. B.* 561.

(b) 33 *L. J. M. C.* 155.

(c) 8 *B. & C.* 78.

compass. The pauper had been sentenced to a year's imprisonment for felony. Pending his imprisonment he became insane, and was by an order of the Secretary of State, dated the 18th *June*, 1864, removed to a lunatic asylum. No application was made for the expenses of his maintenance in the asylum until *August*, 1865. The first application was then made to the appellants, the guardians of the union including the parish in which the settlement of the lunatic was afterwards adjudicated to be, by the proprietor of the lunatic asylum; the second was made to them in *December*, 1866, by the clerk of the peace of the county. On both occasions the guardians of the union replied that no order had been made upon them, and they properly refused to pay because, the lunatic not being in a parish within the union, they were not bound to support him except under an order, and payment by them would have been in their own wrong. No order was obtained under stat. 3 & 4 *Vict. c. 54.* until *March*, 1867, after the term of imprisonment had expired, and at first I was struck with the argument that the order was bad on that ground, and thought the objection might be fatal. But on a more careful examination of sect. 2 the objection was removed; for if a prisoner during the term of imprisonment is transferred from the prison to a lunatic asylum he is not, if still a lunatic, entitled to his discharge at the expiration of the term. That is borne out by the subsequent statute 23 & 24 *Vict. c. 75.*, which expressly enacts in sect. 8 (*a*) that, although the lunatic at the expiration of the term of imprisonment has not been certified to be of sound mind, the Secretary

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(*a*) The Criminal Lunatic Act, 1867, 30 & 31 *Vict. c. 12. s. 6.*, which repeals sect. 8 of stat. 23 & 24 *Vict. c. 75.*, contains in subs. 2 a provision similar to the repealed section.

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of State may make an order for his discharge with a view to his being placed in a county lunatic asylum, or otherwise subjected to the same care and treatment as lunatics not criminal. This shews that unless certified to be sane he could not be discharged without an order of the Secretary of State. Therefore, so far as this objection is concerned, the order is good.

The second objection is, that the order is bad because made by county justices sitting in a borough which had exclusive jurisdiction. It was said that, although stat. 11 & 12 *Vict. c. 42. s. 6.* empowers county justices to act with respect to indictable offences within a borough having exclusive jurisdiction except as to matters arising within it, and although that enactment, being incorporated with stat. 11 & 12 *Vict. c. 43.* by sect. 6 of the latter Act, extends the power of county justices to act within the borough with respect to summary convictions and orders, yet, by the effect of sect. 35 of *c. 43.* the whole operation of the Act is excluded in the case of certain orders, and amongst them orders made with respect to lunatics. That would be so under those Acts, but stat. 26 & 27 *Vict. c. 77. s. 1.* repeals sect. 35 of stat. 11 & 12 *Vict. c. 43.* so far as it controlled sect. 6; and therefore, by the most remarkable piece of in and out legislation which has fallen within my observation, sect. 6 is left standing with reference to the orders mentioned in sect. 35, while other sections of the Act, as sect. 11 which limits the time for making complaints, will not apply to these orders. This objection therefore also fails.

The third objection, which affects part only of the order, is, that it is retrospective. The question is whether, under stat. 3 & 4 *Vict. c. 54. s. 2.*, an order can be made for payment of the maintenance of the lunatic

from the time of his removal to the asylum till the date of the order. I feel the force of the observations of Mr. *Coleridge* as to the inconvenience resulting from our holding that such an order cannot be made. It is a serious thing that when the proprietor of the asylum has no alternative, but must receive the lunatic, an order cannot be made by which he may recover the expenses of his maintenance. This is a state of things which it is not satisfactory to contemplate; but, if the Legislature has not provided for it, it is not incumbent or indeed open to us to cure the omission by construing sect. 2 so that it shall operate to empower the justices to make an order for past maintenance. They are to inquire into the settlement of the lunatic and to order that the parish of settlement shall pay all reasonable charges, first for inquiring into his insanity, secondly for conveying him to the asylum, and thirdly such weekly sum as they or any two justices shall from time to time direct for his maintenance in the asylum. *Primâ facie* this language is prospective, there is no mention of any expense already incurred for maintenance; and we start with this indisputable proposition of law, that a poor rate must be prospective and not retrospective, for the reason that expenses incurred ought to fall upon the ratepayers for the time being, and by a retrospective rate persons are made to pay who were not ratepayers at the time the expenses were incurred. That being so, whenever the Legislature has thought it right to authorise the making of a retrospective rate, it has not given the power of levying a rate generally but fixed a period as to which it might be made retrospective. In the present case the effect of holding that an order may be made retrospectively would be that it might be made so without any

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limitation, and the period, which in the present case is nearly three years, might be extended to ten years. It was indeed suggested that we might couple the power of making the order with a condition, viz., provided it was applied for within a reasonable time, but sect. 2 specifies the expenses of inquiry and of removal and then stops; it says nothing about expenses incurred between the removal to the asylum and the order; thus excluding the authority of the justices to make an order for a lump sum in respect of byegone expenses. I trust that the consequences of this omission will be speedily averted by the Legislature.

BLACKBURN J. I am of the same opinion on all the points but one, and as to that I have too much doubt to concur with my Lord but not sufficient to dissent without further time for consideration.

The first question arises on stat. 3 & 4 *Vict. c. 54. s. 1.* When a prisoner becomes insane he is to be removed by order of the Secretary of State to the county lunatic asylum or other proper receptacle for insane persons, and is to remain there until he is certified to be of sound mind, and then if the term of imprisonment has not expired, he is to be removed back to the prison in which he was confined, or if it has expired he is to be discharged. I agree with my Lord and the rest of the Court that during the interval between the expiration of the term of imprisonment and his discharge he is to be considered as in custody under the order of the Secretary of State, and therefore is to be maintained in the same way as he would be if the term of imprisonment had not expired.

Then comes the question, how is his maintenance to be provided for during that interval? Sect. 1 is silent

as to that; under it the proprietor of the asylum, though he has a moral and equitable claim on the Secretary of State to recoup him for the maintenance of the lunatic, has no legal claim. Sect. 2 provides how he is to be repaid certain expenses: an order adjudicating the settlement must first be made on the overseers of the parish or the guardians of the union, or the treasurer of the county. That order cannot be obtained immediately on the prisoner being removed under the order of the Secretary of State, because his settlement cannot be ascertained without inquiry and the period during which inquiry is being made would in common cases be weeks, in some cases months. In the meantime the lunatic must not starve, and therefore the proprietor of the asylum must maintain him. The Legislature could not have intended that the proprietor of the asylum should maintain him at his own expense. On the other hand, if an order is made at the end of that period, the parish of settlement will be called upon to pay, and the ratepayers, being a fluctuating body, will have changed. One construction of the section, and that to which I incline, is that the order may be made without stint as to time, though that may be hard upon those who having become parishioners after the expenses have been incurred are made to contribute to the payment of them. The other is that the order shall not be made for payment of any byegone expenses, and then the proprietor of the asylum will not be paid or will only have an equitable claim on the Lords of the Treasury. In each construction there is great difficulty. The first question is, what do the words of sect. 2 mean? That the justices may make an order for the future maintenance of the lunatic from the date of the order, or that they may make an order for his

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past and future maintenance from the day when he was sent to the asylum? The last clause of the section, which provides that if a lunatic prisoner is possessed of property it shall be applied towards the expenses "incurred or to be hereafter" incurred on his behalf, indicates an intention of the Legislature that his property should be liable for expenses from the date of the order sending him to the asylum. I am therefore inclined to think that the right construction of the section is that it gives the justices power to make an order for the payment of weekly sums for the maintenance of the lunatic from the time he was sent to the asylum. As to the decisions in which retrospective orders have been held bad, the principle was not laid down in *Rex v. The Inhabitants of Maulden* (a) so strongly or generally as it was cited to us. In that case it was unnecessary that the justices should have power to make a retrospective order, for, as counsel pointed out, stat. 48 G. 3. c. 96. s. 17. authorized them to make an order at the time when the pauper was sent to the lunatic asylum; and Lord *Tenterden*, at the end of his judgment, p. 81, said, "As there is not any necessity that the justices should have such power, and as no such power is expressly reserved to them, I am of opinion that they had it not." In the present case, unless there is power to make a retrospective order, the proprietor of the asylum is placed in the predicament of being unable to obtain reimbursement of the expenses of maintenance except through the benevolence of the Crown. The difficulty on the other hand of holding that the order may be made retrospectively is that referred to by my Lord. If I could find in the statute authority for taking a middle course so that the order

(a) 8 B. & C. 73.

might be made retrospective for a reasonable time I would heartily adopt it. I would also say that the application for the order should be made within twelve months after the lunatic was received into the asylum, which would limit the power of making a retrospective order. This I believe to be also my brother *Mellor's* view. I do not hesitate to say that two years is an unreasonable time.

On the other point I entirely agree with the rest of the Court. First. The Legislature, knowing that there were county buildings situated within boroughs having exclusive jurisdiction, enacted by stat. 11 & 12 *Vict. c. 42. s. 6.* that justices for the county might act as such with respect to indictable offences at any place within those boroughs. In the same year, by *c. 43. s. 6.*, the provision in *c. 42. s. 6.* was incorporated into the latter Act, a mode of legislation which is not convenient; and why the framer of the Act did not re-enact that provision I do not know, for sect. 6 of *c. 43.* contains very few more words than sect. 6 of *c. 42.* Sect. 35 of *c. 43.* enacts that nothing in that Act shall extend to, among other things, orders of removal, nor to complaints or orders made with respect to lunatics, or the expenses incurred for their maintenance. The effect of this chipbox of enactments is that the limitation in sect. 11 of *c. 43.* as to the time of applying for an order does not apply to orders of removal or orders with respect to lunatics. Then stat. 26 & 27 *Vict. c. 77.*, to amend stat. 11 & 12 *Vict. c. 43.*, introduces a wonderful state of things. Sect. 1 enacts, "The 35th section of the principal Act," that is, *c. 43.*, "shall not apply to or control the 6th section of the same Act, and such last mentioned section shall be construed as if the 35th section were not and never had

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been contained in the principal Act." This enactment, though not faulty in respect of being too long, might have been clearer. However, it is plain enough that the effect of stat. 26 & 27 *Vict. c. 77. s. 1.* is, that the Legislature say we made a mistake in stat. 11 & 12 *Vict. c. 43.* and correct it by enacting that sect. 35 shall be read with a proviso that it shall not prevent county justices acting under sect. 6 in the cases mentioned in sect. 35.

MELLOR J. I do not desire to add anything on the first point.

On the second, unless stat. 26 & 27 *Vict. c. 77.* has the meaning which my Lord and my brother *Blackburn* put upon it, I do not see what rational object it has; and we are bound to attribute to it some meaning if we can.

On the other point I differ from the rest of the Court. Considering the object and circumstances for which the legislation in stat. 3 & 4 *Vict. c. 54.* provides, inasmuch as there must be expenses for which an order could not at once be obtained, it must be to a certain extent retrospective. The intention could not have been to leave the proprietor of the asylum to the equitable consideration of the Lords of the Treasury; but rather that all the expenses of the maintenance as well as of the removal to the asylum and of the inquiry into the state of mind of the lunatic should fall on the parish of settlement. And I do not feel the same amount of difficulty which is felt by the rest of the Court in reading the word "maintenance" in sect. 2; it is a large word, and may, I think, include the costs of maintenance from the time of the removal of the lunatic to the asylum till the time when application is

made for the order. Therefore I should hold that there was power to make a retrospective order by virtue of the words of the statute. And when the question is whether the order can be enforced, I do not see the difficulty of holding that the person who applies for such an order must apply promptly, not indeed within a reasonable time as that phrase is understood in a contract, but he must not offend against the doctrine of law that a rate is not to be retrospective so as to throw the expenses of one year upon the ratepayers of another. I do not see anything except that doctrine which prevents such an order as this being made at any time. But, upon the ground that the proprietor of the asylum cannot by his own neglect throw the expenses of the year 1867 on the ratepayers of 1868, I come to the same conclusion as the rest of the Court that the order is bad as to part.

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LUSH J. The first question is, whether this order was made in time. I cannot doubt that the justices had power to make the order after the term of imprisonment had expired. It is equally clear that so long as the lunatic continued in the asylum in a state of insanity it was competent for them, under stat. 3 & 4 *Vict. c. 54. s. 2*, to ascertain the place of his settlement and to direct the guardians of the union to pay the charges for inquiring into his insanity, for his removal to the asylum, and for his future maintenance in it. Therefore, so far the order is good.

The next question is, whether the justices of the county might lawfully make this order while they were sitting in the borough of *Devizes*? As to this there is very clumsy legislation. But the effect of the amending statute 26 & 27 *Vict. c. 77. s. 1.* is, that sect. 35 of stat.

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11 & 12 *Vict.* c. 43. does not prevent sect. 6 of the same Act from applying to the jurisdiction of the county justices. Therefore the county justices sitting in the borough might lawfully make this order.

The most material question is, whether the justices could make an order which imposes the payment of by-gone expenses on the ratepayers of the present year. I agree with the Lord Chief Justice that the language of stat. 3 & 4 *Vict.* c. 54. s. 2. is prospective, and I am unable to see my way to putting any qualification on the words "to pay such weekly sum as they or any two justices shall, by writing under their hands, from time to time direct, for his or her maintenance in the asylum." The words are capable of meaning maintenance past and future, or only future maintenance. If I read them as applying to past maintenance there is no limit in point of time, inasmuch as the order may be made at any time after the lunatic has been transferred to the asylum; and the parish would thus be burdened with the whole expenses of the past maintenance; for I cannot see that the order might be made for part only of those expenses. And the rule of law being that a rate cannot be made for the expenses of past years, I must interpret the words of the statute, unless a contrary intention appears, as saying that the order is to be for the expenses of maintenance from the date of the order.

Order quashed as to part.

END OF TRINITY TERM.

TRINITY VACATION, 31 VICT.

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The QUEEN *against* The Mayor, Aldermen and
Burgesses of TEWKESBURY.

Saturday,
June 13th.

*Municipal
corporation.
Election of
councillors.
Disqualifica-
tion of can-
didate.
Notice to
electors.*

1. If an elector at a municipal corporation election having knowledge or notice of the disqualification of a candidate wilfully votes for him, his vote is thrown away. But

2. Knowledge of the fact which creates a legal disqualification does not involve knowledge that the candidate is legally disqualified.

3. At the annual election of councillors in a borough not divided into wards, there were four vacancies and five candidates, including *B.* and *M.* *B.* was mayor of the borough, and as such was returning officer and presided at the election. Before the opening of the poll on the morning of the election a formal notice was served upon the deputy mayor and assessors, and within half an hour after on *B.* himself, that he was disqualified for the office of councillor during the term of his mayoralty; and about half an hour after the opening of the poll notices to the same effect addressed to the burgesses were posted up in conspicuous parts of the borough. *B.* had 312, *M.* 143 votes. Held, that the votes given for *B.*, though bad, were not thrown away, and that there must be a new election.

MANDAMUS to the defendants commanding them to permit *E. Moore* to vote and act at meetings of the council of the borough of *Tewkesbury* as one of the councillors duly elected and qualified to serve that office. Upon the return to the writ the following case was stated.

The borough of *Tew esbury* is one of the boroughs named in Schedule (A.) of stat. 5 & 6 *W.* 4. c. 76., and has a mayor, four aldermen and twelve councillors. There are no wards.

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On the 1st *November*, 1866, one third part, namely, four, of the councillors who had been longest in office without re-election went out of office, among them being *G. Blizzard*, and on the same day an election was held to supply their places.

G. Blizzard was on the 1st *November*, 1866, the mayor and returning officer of the borough, and was entitled to hold and exercise that office until the 9th *November*, 1866, and until his successor should have been duly appointed and should have accepted the office. *J. F. Prosser* was before and on the same 1st *November* the deputy mayor (appointed by *G. Blizzard*), and *C. Fisher* and *G. Watson* were the assessors of the borough. No person was appointed by the town council to act as substitute for the mayor as returning officer at the election pursuant to sect. 36, and the election was held before the mayor, deputy mayor and assessors. The mayor presided personally as returning officer at the election during about two hours of the time of polling, but he was not present at the opening of the poll nor for about a quarter of an hour after. The poll was opened at 9 o'clock in the morning and closed at 4 o'clock in the afternoon.

At the election there were five candidates duly nominated, namely, *G. Blizzard*, *W. G. Healing*, *J. H. Boughton*, *R. Rice* and *E. Moore*. The four first named polled 312 votes each, and *E. Moore* polled 143 votes. *G. Blizzard* permitted himself to be nominated as a candidate and to be re-elected as a councillor of the borough, and voted for himself, and as mayor presiding in person at the election during portion of the day he received voting papers on behalf of himself and the other candidates.

At a quarter before nine in the morning of the day of the election, and before the opening of the poll, *F. Moore* on behalf of *E. Moore* attended at the town hall of the borough and then and there served upon the deputy mayor, who was about to preside at the election by the appointment and on behalf of *G. Blizzard*, and upon the two assessors, in the presence of the town clerk, a notice in writing signed by *E. Moore* and addressed to the mayor, his deputy and the assessors, stating that *G. Blizzard*, one of the persons nominated for the office of councillor at that election, being the mayor of the borough, was disqualified for the office of councillor and ineligible to be nominated or elected a councillor during the term of his mayoralty, and therefore that all votes given to him would be thrown away.

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Within half an hour after the opening of the poll a written copy of that notice was served by *F. Moore* upon *G. Blizzard*, who nevertheless proceeded to the town hall and alternately with his deputy presided throughout the day at the election.

About half past nine o'clock on the morning of the day of the election *E. Moore* caused printed copies of a similar notice to be posted on the outside of the town hall in which the election was held, on the public market place in the borough, and in various other conspicuous parts of the borough, in all which places, except the town hall, they remained legible to passers by throughout the day. He also caused other printed copies to be exhibited and carried on boards during the remaining hours of polling through the public streets of the borough and other copies to be distributed generally at various shops and houses throughout the borough. The notice posted outside the town hall was

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 v. restored. No verbal notice was given nor was any
 Mayor, &c. of other written or printed notice made visible or shewn
 TEWKESBURY. to or served on the voters tendering their votes for
G. Blizzard at the election. Several persons recorded
 their votes before the printed notice had been made
 public.

On the day of the election, and after he had received the notice, *G. Blizzard*, whilst he was presiding over the election as mayor, produced and publicly exhibited in the town hall where the election was being held a printed copy of an address, and afterwards caused printed copies of the same to be issued and distributed among the burgesses during the hours of polling, assuring the electors that when elected he should confidently take his seat notwithstanding the efforts to deprive him of it.

At the close of the election the deputy mayor and assessors examined the voting papers delivered in at the election, and at the time by law appointed published the list of persons elected councillors, consisting of the names of *G. Blizzard* and the three other candidates who had a majority of votes ; and they thereupon respectively made and subscribed the declarations required by law, and took upon themselves the office of councillors and acted in that office.

E. Moore also made and subscribed the required declaration of acceptance of the office and caused the same to be delivered to the town clerk.

An information in the nature of a quo warranto in which *E. Moore* was relator was afterwards exhibited against *G. Blizzard*, and on the 15th *December*, 1866,

he disclaimed the office, and judgment of ouster was recorded against him (a).

On the 29th *December*, 1866, *E. Moore* caused to be served upon the mayor and also upon the town clerk a notice addressed to the mayor, aldermen and burgesses of the borough claiming to be admitted to act as town councillor instead of *G. Blizzard*, and stating the grounds upon which he required them to admit him.

In pursuance of that notice *E. Moore* attended the quarterly meeting of the town council of the borough on the 1st *January*, 1867, and claimed to be a town councillor and to vote and act as such, but the town council then refused and had since continued to refuse to admit him to that or any other meeting of the town council or to vote or act as a town councillor.

The question for the opinion of the Court was, whether *E. Moore* was duly elected a councillor of the borough at the election on the 1st *November*, 1866.

Dowdeswell (*Matthews* with him), for the prosecutor. — *Blizzard* being the mayor and returning officer at the time of the election was disqualified to be elected; *Reg. v. Blizzard* (b); and the votes given for him with knowledge or notice that he was disqualified were thrown away; *Rex v. Hawkins* (c); affirmed in *D. P.* (d), *Reg. v. Boscawen*, *Rex v. Withers*, and *Taylor v. The Mayor of Bath*, mentioned by Lord *Ellenborough*, 10 *East* 217-18, also cited by *Buller* arguendo in *Rex v. Monday* (e), and by *Wilmot J.* in *Oldknow v. Wainwright* or *Rex v. Foxcroft* (f). [*Blackburn J.* In

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(a) See *Reg. v. Blizzard*, 7 B. & S. 922.

(b) 7 B. & S. 922.

(c) 10 *East* 211.

(d) 2 *Dow* 124.

(e) *Courp.* 530. 537.

(f) 2 *Burr.* 1017. 1020-1.

1868. *Rex v. Hawkins* the notification that the defendant had not taken the sacrament within a year, and was on that account ineligible, and the publicly reading the incapacitating clause, sect. 12, of the Corporation Act, 13 Car. 2. st. 2. c. 1., constituted notice to the electors of fact and law. Lord *Eldon* in the House of Lords gave an elaborate opinion which is rather against the prosecutor. He said (*a*), "If the majority were unpolled at the time of the notice given, the utmost that those who had polled without notice could say would be, 'Place us in the same situation in which we would have been if notice had been given at the beginning of the election'; and that was only matter for consideration, if they could not proceed on the theory, that all continued present till the election was over. The notice was given, and why did the election continue under these circumstances? And why did not those, who were surprised perhaps, require to vote again? Unless it was the duty of others to call on them to do so, they ought to have done it, and, if they did not, they sanctioned all that was done; and their complaint came too late when they might have required to vote again, and have made the election effectual by voting, or ineffectual, if their votes had been refused. But no other man would have been chosen here. The majority knowingly voted for this dead man." When it is said that the votes given to a candidate with *notice* of his incapacity are thrown away, is such a notice as notice of dishonour of a bill of exchange necessary, or is knowledge of the fact which disqualifies sufficient?] A general notice, as of an act of bankruptcy, is sufficient. [*Lush J.* That notice is regulated by statute; but does the common law say that in the case

(*a*) 2 *Dow* 124. 147-8.

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of an election general notice of the disqualification of a candidate is sufficient? If the disqualification rested on a doubtful point of law it would be hard that the votes should be thrown away. Suppose this election had occurred before *Reg. v. Owens* (a).] Though that was the first decision that the mayor of a borough not divided into wards is precluded from being a candidate for election as councillor, the law was notorious before. In *Reg. v. Coaks* (b), the question being whether *Cundall* had the right to vote at an election of mayor, which depended upon whether he or *Blake* had been properly elected councillor, the special verdict found that *Blake* "was disqualified to be a councillor, being an alderman," and "that those who voted for *Blake* had notice that he was disqualified"; and it was held that the votes given for *Blake* were thrown away as if he had never stood. [*Blackburn J.* Were the burgesses bound to take notice that *Blizard* was disqualified in law?] A person who is about to exercise a right should take pains to ascertain the law, especially when he is warned that a question of law is involved; and, knowing the facts which give rise to it, he exercises the right at his peril: *Ignorantia juris non excusat*; *Plowd.* 343; *Manser's Case* (c), *Broom Legal Maxims* 249, 4th ed. In *Martindale v. Falkner* (d), which was an action upon an attorney's bill, the majority of the Court thought that the client was bound to know what the Court could discern by fair and reasonable intendment from the bill. [*Lush J.* In that case *Maule J.* delivered a famous judgment differing from *Tindal C. J.*, *Cresswell* and *Erle JJ.* *Blackburn J.* *Maule J.*, who had one of the acutest

(a) 2 F. & E. 86.

(b) 3 F. & B. 249.

(c) 2 Co. 3 a. b.

(d) 2 C. B. 706.

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minds when he set it to explain the law, held that the client was entitled to more information than a person who knew the law.] The maxim *Ignorantia eorum, quæ quis scire tenetur, non excusat* applies also in criminal cases, 1 *Hale P. C.* 42; and *Tindal C. J.*, in delivering the opinion of the Judges in answer to questions propounded to them by the House of Lords, see *M'Naghten's Case (a)*, stated the proposition generally: "The law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it." Here the electors who voted for *Blizard* did a void act. [*Blackburn J.* If a man enters the land or takes the goods of another he is liable to an action of trespass or trover without any claim of right on the part of the other person, but he is not liable criminally. So by a provision impliedly annexed to the exercise of summary jurisdiction by magistrates they are to hold their hands if a *bonâ fide* claim of right is made. Suppose a secret disqualification, the election would be void when it was discovered, but the votes would not be thrown away.]

At all events the votes given for *Blizard* after the notices that he was disqualified had been posted up were thrown away; *The Belfast Case (b)*. [*Blackburn J.* In order to entitle the prosecutor to be admitted as a councillor it is necessary to shew that he was in a majority after deducting the votes for *Blizard*, which were thrown away. *Powell, contra*.—The voting papers afford no information as to the time when the votes are given. *Blackburn J.* The decisions by Committees of the House of Commons on election petitions as to whether votes given after publication of notice of disqualification

(a) 10 *Cl. & F.* 200. 210.

(b) *Falc. & Fitz.* 595.

are thrown away are conflicting. His Lordship referred to *The Horsham Case* (a) and *The Clitheroe Case* (b).]

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Powell (H. James with him), for the defendant, was not called upon.

BLACKBURN J. On the facts stated in this case we cannot order a peremptory mandamus to admit the prosecutor to vote and act as a town councillor. At the annual election of councillors in *November* there were four vacancies and five candidates including *Blizard* and the prosecutor. *Blizard* was mayor of the borough, and as such was the returning officer, and presided at the election. It is settled on the authority of *Reg. v. Owens* (c) that a returning officer is incapable of returning himself, and therefore *Blizard* was disqualified for the office of councillor and ineligible; and in *Reg. v. Blizard* (d) we granted an information in the nature of a quo warranto to oust him. Under these circumstances the question is whether the prosecutor, who was fifth on the poll, is entitled to be admitted to the office of councillor. A candidate is duly elected if he has a majority of legal votes of those present at the election; though the majority walk away from the meeting or refuse to vote; *Rex v. Withers* mentioned by Lord *Ellenborough* in *Rex v. Hawkins* (e). Further, if an elector having knowledge of the disqualification of a candidate perversely votes for him, it is the same as if he had not voted at all or had voted for a non-existent person; *Reg. v. Coaks* (f), per Lord *Campbell*. Does it

(a) 1 *Pow. R. & D.* 240. 256.(b) 2 *Pow. R. & D.* 276. 281.(d) 7 *B. & S.* 922.(c) 2 *E. & E.* 86.(e) 10 *East* 211. 217.(f) 3 *E. & B.* 249. 254.

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appear in the present case that so many burgesses voted for *Blizard* knowing that he was disqualified as to reduce the number of legal votes given to him below the number given to the prosecutor? If it does, the prosecutor is entitled to be declared duly elected: if not, the election is void.

It appears that *Blizard* acted as returning officer, the council not having taken the course which in *Reg. v. White (a)* was held to be the right one of appointing a substitute as directed by stat. 5 & 6 W. 4. c. 76. s. 36. A formal notice stating that *Blizard* was disqualified during the term of his mayoralty was served upon the deputy mayor and assessors before the opening of the poll, and upon the mayor himself within half an hour after. Also about half past nine o'clock in the morning notices were posted up in conspicuous parts of the borough intended to bring to the knowledge of the burgesses that *Blizard* was in law disqualified. This was evidence to go to a jury that those burgesses who voted after half past nine o'clock had notice; but there is nothing to oblige us to draw that inference. It is found that several persons voted before the printed notice was made public; and though it is not probable that so many voted for *Blizard* before it was made public as would exceed the whole number who voted for the prosecutor, there was no personal knowledge of the disqualification brought home to the later voters.

Then the question is whether knowledge of the fact that *Blizard* was the mayor and returning officer must be taken to involve knowledge that he was legally disqualified for election, and therefore the votes for him would be thrown away, as every lawyer would know

(a) 8 B. & S. 587. 592-3.

who had read the case of *Reg. v. Owens* (a). I agree that ignorance of the law does not excuse. But there is great common sense in the following observations of *Maule J.* in *Martindale v. Falkner* (b), and they are a good exposition of the law : "There is no presumption in this country that every person knows the law : it would be contrary to common sense and reason if it were so. In *Jones v. Randall* (c) *Dunning*, arguendo, says : 'The laws of this country are clear, evident, and certain : all the Judges know the laws, and, knowing them, administer justice with uprightness and integrity.' But Lord *Mansfield*, in delivering the judgment of the Court, says : 'As to the certainty of the law mentioned by Mr. *Dunning*, it would be very hard upon the profession if the law was so certain that everybody knew it : the misfortune is, that it is so *uncertain* that it costs much money to know what it is, even in the last resort.' It was a necessary ground of the decision in that case, that a party *may* be ignorant of the law. The rule is, that ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime, or from liability upon a contract. There are many cases where the giving up a doubtful point of law has been held to be a good consideration for a promise to pay money. Numerous other instances might be cited to shew that there may be such thing as a doubtful point of law. If there were not," as *Maule J.* truly remarks, "there would be no need of Courts of appeal, the existence of which shews that Judges may be ignorant of law." Here the question is not whether every vote given for *Bhizard* with the knowledge that he was mayor was thrown away

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(a) 2 E. & E. 86.

(b) 2 C. B. 706. 719-720.

(c) *Coup.* 37, 38. 40.

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in the sense that it was inoperative, being given for a candidate who could not be elected ; but whether the effect is the same as if the voter had absented himself. I go so far as this : if a voter, after being warned that a certain circumstance in point of law disqualifies a candidate, yet, acting on the opinion of others who say that is not the law, votes for that candidate, his vote is thrown away. But in the present case the electors only knew that *Blizard* was mayor and acting as returning officer, which to a good lawyer brings the knowledge that he was disqualified as a candidate, but would not necessarily make a voter aware of the disqualification. In *Rex v. Hawkins* (a) Lord *Ellenborough* states, as a “ general proposition that votes given for a candidate, after notice of his being ineligible, are to be considered as the same as if the persons had not voted at all,” and mentions three cases by which it is supported, cited in *Rex v. Monday* (b). “ In the third case,” (*Taylor v. The Mayor of Bath*), “ *Taylor*, *Bigg*, and *Kingston*, were candidates : *Bigg* was objected to as a disqualified person ; notwithstanding which, *Bigg* had fourteen votes, *Taylor* thirteen, and *Kingston* only one. There Lord Chief Justice *Lee*, at *Nisi prius*, directed the jury, that if they were satisfied that the electors had notice of *Bigg*’s want of qualification, they should find for the plaintiff ; . . . because *Bigg* not being qualified was to be considered as a person not in esse, and the voting for him a mere nullity. The jury found for the plaintiff : and the Court, on motion for a new trial, agreed with the law as laid down by Lord Chief Justice *Lee*, and refused a new trial.” The proposition of Lord *Ellenborough* is, that the voters whose votes were thrown

(a) 10 East 210. 217.

(b) *Cowp.* 530. 537-8.

away were those who had actual knowledge of the disqualification, not merely such as arises from a presumption of knowledge of the law. And on this ground Lord *Eldon* places the affirmance of the judgment in the House of Lords (a), intimating that if any electors had voted under a misapprehension they might claim to have the election begin afresh, so that they might vote for a new candidate ; but in the principal case he said, p. 148, "The majority *knowingly* voted for this dead man ;" expressing the idea that they wilfully persevered in voting for a disqualified candidate after they knew that he was disqualified. And in *Reg. v. Coaks* (b) Lord *Campbell* C. J. says, pp. 253-4, "*Blake* was, in fact, a candidate ; but he was an alderman, and therefore ineligible ; and that fact was known to the electors. Now it is the law, both the common law and the parliamentary law, and it seems to me also common sense, that, if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a non-existent person ; as it has been said, as if he gave his vote for *The Man in the Moon*." The illustrations put shew that, in Lord *Campbell's* opinion, in order to make the vote a nullity the voter must have wilfully and knowingly voted for a person incapable of election. On the other hand it is neither common sense nor, I think, common law to say that because voters are aware of a particular fact they must be taken to know the disqualification arising from it so that their votes given in ignorance of the specific objection are thrown away.

LUSH J. If those votes only are to be considered as thrown away which were given after publication of the

(a) 2 *Dow* 124.

(b) 3 *E. & E.* 249.

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notice that one of the candidates was mayor and was disqualified during the term of his mayoralty, we have not sufficient materials before us to enable us to determine whether the prosecutor had a majority over the legal votes given for his opponent. We are therefore compelled to ascertain what is the principle involved in the cases which decide that votes given for a candidate whom the voters know to be disqualified are thrown away, that is, are to be treated as if they had not been given at all. The fact that *Blizard* who presided at the election was mayor was known to all the voters. Do the decisions mean that, if a voter knows a fact which by construction of law operates as a disqualification of a candidate, it amounts to knowledge of his legal incapacity to be elected, and therefore his vote given for that candidate is thrown away? I am of opinion, for the reasons given by my brother *Blackburn*, that, in order to produce that result, the voter must know that the fact amounted to a disqualification. To hold it enough to shew mere knowledge of the fact creating the legal incapacity would go far beyond the principle of the cases. All the illustrations which are put in them are instances in which of necessity the voter must know that the giving his vote would be of no avail. It was said that the maxim *Ignorantia juris non excusat* imputes to every voter knowledge of the disqualification of a candidate, but that is an entire misapprehension of the maxim. The maxim is applicable to the present case to this extent, that the voter's ignorance of the disqualification of the candidate does not make his vote good; but that is very different from saying that the candidate who was in the minority is to be declared duly elected on the ground that those burgesses who

mistakingly voted for *Blizard* are to be placed in the same position as if they had perversely voted for him, that is, as if they had not voted at all. Therefore there must be a new election.

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Judgment for the defendants.

WADDINGTON, Executor &c., *against* ROBERTS.

Tuesday,
June 23rd.

1. A deed between a debtor and his creditors which fairly carries out the previous assents of the creditors is sufficient under The Bankruptcy Act, 1861, 24 & 25 *Vict. c. 134. s. 192. subs. 1.*

2. So, if the creditors assent to a deed of composition, and the deed contains also a release of the debtor from his debts and liabilities.

3. A memorandum on the deed in pursuance of sect. 196, stating the day and hour on which it was brought into the office of the registrar for registration, and a certificate of registration by the registrar, are *prima facie* evidence of an affidavit by the debtor having been delivered, together with the deed, in pursuance of sect. 192. subs. 5.

Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192. subs. 1. 5. s. 196. Composition deed. Assent of creditors. Affidavit. Evidence.

ACTION by the plaintiff as executor on a bond for 150*l.* given by the defendant to the plaintiff's testatrix.

Plea. A deed of composition between the defendant and his creditors in the lifetime of the testatrix according to The Bankruptcy Act, 1861, 24 & 25 *Vict. c. 134. s. 192.*

Issue.

At the trial, before *Kelly C. B.*, at the Spring Assizes at *Gloucester*, the defendant, who was an attorney, produced a deed of composition dated the 6th *July*, 1866, executed by the plaintiff and a trustee. It contained a release of the defendant from his debts and liabilities, but no assignment of the property of the defendant, there being none. A memorandum was written on the face of it stating the day and hour at which it was

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brought into the office of the registrar of the Court of Bankruptcy for registration. There was also a certificate under the hand of the registrar and the seal of the Court dated the 9th *August*, 1866, that the deed was on that day brought into his office for registration and was duly registered pursuant to the provisions of The Bankruptcy Act, 1861. The defendant also produced the assents in writing of more than three-fourths in value of his creditors whose debts respectively amounted to 10*l.* and upwards, and stated that he read over the draft of the deed to some of them and wrote letters to others explaining as well as he could the effect of the deed. The assents were in the following form :—" I, the undersigned, being a creditor of *H. Roberts* for £ , hereby assent to and approve of a deed to be by him executed for the payment to his creditors of a composition of 5*s.* in the pound in discharge of their debts, to be paid by half-yearly instalments of 25*l.*"

It was objected for the plaintiff, first, that the defendant had not proved the delivery of an affidavit to the registrar in compliance with stat. 24 & 25 *Vict. c. 134. s. 192. subs. 5* ; secondly, that the assents, to be sufficient within sect. 192, subs. 1, must be with full knowledge of the exact contents of the deed, and some of the assents were given to what the defendant stated in his letters to the creditors he believed to be the true effect of the deed about to be executed. Also that the assents were insufficient, having all been given before the deed was executed ; and further that they did not correspond with the deed, as it contained a release as well as composition.

A verdict was entered for the defendant, with leave to move to enter it for the plaintiff.

In *Easter Term*,

H. James obtained a rule accordingly.

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The Bankruptcy Act, 1861, 24 & 25 *Vict. c.* 134. s. 192., enacts that every deed or instrument made between a debtor and his creditors, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, &c., shall be binding on all the creditors of such debtor, provided certain conditions are observed, among which are the following:—

“1. A majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to 10*l.* and upwards shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument.”

“5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value, of the creditors of the debtor whose debts amount to 10*l.* or upwards have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed.”

Sect. 196. “Every such deed, on being so registered as aforesaid, shall have a memorandum thereof written on the face of such deed, stating the day and the hour of the day at which the same was brought into the office of the chief registrar for registration.”

Gray shewed cause.—First. The assent of the credi-

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tors required by stat. 24 & 25 *Vict. c. 134. s. 192. subs. 1.* may be given before the deed is in existence; *Rutty v. Benthall (a)*.

Secondly. The memorandum on the deed and the certificate of its registration by the registrar are sufficient *primâ facie* evidence that the defendant made an affidavit and delivered it together with the deed in compliance with sect. 192, subs. 5, for without it the deed would not have been duly registered; *Cheney v. Courtois (b)*. [He also cited *Reg. v. Benson (c)*, *Bastard v. Trutch (d)*, *Bruce v. Nicolopulo (e)*, *Reg. v. Manwaring (f)*, *Sichel v. Lambert (g)*, *Reg. v. Cradock (h)*.] By sect. 204 judicial notice is to be taken of the signature of the registrar and of the seal of the Court of Bankruptcy.

H. James and *Harington*, in support of the rule.—First. Stat. 24 & 25 *Vict. c. 134. s. 192. subs. 1.* requires that a majority of the creditors shall “assent to or approve of such deed or instrument;” therefore the deed or instrument ought to be in existence. Further, this deed is not in conformity with the assents of the creditors. In *Rutty v. Benthall (a)* the assents of the creditors were given to a deed of composition and release; here the assents were to a deed of composition only, and this deed contains a release also. [*Blackburn J.* It is natural and reasonable that there should be a release in the deed if the composition is paid.] The form given in Schedule (D.), does not contain a release. [*Lush J.* That is not the form of a composition deed but of an

(a) 36 *L. J. C. P.* 194; *L. R.* 2 *C. P.* 488.

(b) 13 *C. B. N. S.* 634.

(c) 2 *Camp.* 508.

(d) 3 *A. & E.* 451.

(e) 11 *Exch.* 129.

(f) *Dears. & B.* 132.

(g) 15 *C. B. N. S.* 781.

(h) 3 *F. & F.* 837.

assignment of the estate and effects of the debtor for the benefit of his creditors. This deed does not give the debtor a greater advantage than a deed of composition without a release. *Blackburn J.* If the deed fairly carries out the assents it is sufficient, otherwise the assents never could be given before the deed was in existence, and putting a release into the deed does no harm; we have in effect held that more than once (a).]

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Secondly. The deed derives its whole force from the statute, and strict proof is necessary to shew that each statutory condition was observed. In *Morgan v. Savin (b)*, tried before *Willes J.*, that learned Judge was of opinion that these conditions were not conditions precedent which The Common Law Procedure Act, 1852, 15 & 16 *Vict. c. 76. s. 57.*, required to be specified in pleading by the party denying the averment of performance of them, but "conditions of the existence of the deed." The conditions in subsect. 5 of stat. 24 & 25 *Vict. c. 134. s. 192.* should be proved with the same strictness as those in subsects. 2 and 3 relating to the deed itself. The only effect given by the statute to the certificate of registration is, that by sect. 198 it is available to the debtor as a protection in bankruptcy. [*Lush J.* The registrar could not properly indorse the memorandum on the deed unless he had received the affidavit. *Blackburn J.* In *Grindell v. Brendon (c)*, decided on the Act for the registration of Bills of Sale, *Williams J.* said, p. 703, "The statute 17 & 18 *Vict. c. 86. s. 1.*, requires the affidavit to be filed at the same time with the bill of sale, and the clerk has no authority to receive the one

(a) See *Keyes v. Elkins*, 5 B. & S. 240, pl. 1.

(b) 16 L. T. 333, 334.

(c) 6 C. B. N. S. 698.

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without the other. That which certifies the time of the receipt of the one, therefore, certifies the receipt of the other at the same time.”] There the only question was whether a certified copy of the bill of sale and affidavit, and of the entry in the office book of the filing thereof, would have been sufficient proof under stat. 14 & 15 *Vict. c. 99. s. 14*. [*Lush J.* Suppose the deed was produced with an affidavit annexed.] That would not be evidence that the requisite affidavit was delivered to the registrar. Stat. 24 & 25 *Vict. c. 134. s. 192. subs. 5.* requires that the affidavit should state the amount in value of the property and credits of the debtor comprised in the deed; and the truth of that statement should be proved. [*Lush J.* Subsect. 5 does not say anything about the truth of the statement. *Blackburn J.* The argument must go to this length: that if the affidavit was not proved to be accurate as well as true it would invalidate the deed. Moreover here is no *cessio bonorum*, the debtor having no property.]

BLACKBURN J. We have expressed our opinion that the assents of the creditors to the deed were sufficient within stat. 24 & 25 *Vict. c. 134. s. 192, subs. 1.*, which expressly provides that they may assent before or after the execution of the deed by the debtor.

As to the other question, sect. 192 enacts that a composition deed shall be binding upon all the creditors of a debtor provided certain conditions are observed; and subsect. 5 requires that together with the deed there shall be delivered to the registrar an affidavit by the debtor or a certificate by the trustee or trustees containing certain statements. The question is, whether this condition was fulfilled. A composition deed was

produced with a memorandum written on it stating the day and hour on which it was brought to the office of the registrar for registration, and with a certificate of the registration of the deed under the hand of the registrar and the seal of the Court, from which it appears that the registrar could not have performed his duty in registering the deed unless it was accompanied by an affidavit. The presumption is that a public officer charged with a public duty has done it, and therefore the certificate is *primâ facie* evidence that an affidavit was delivered to the registrar in compliance with the enactment. I cannot distinguish proof of a condition required by a Bankruptcy Act from proof of a condition required by any other Act, *e. g.* stat. 17 & 18 *Vict. c. 86. s. 1.*, which requires that together with the bill of sale an affidavit of the time of the bill of sale being made, &c., shall be filed. And *Grindell v. Brendon* (*a*) decided, first, that an office copy of a bill of sale registered in pursuance of that Act was sufficient proof of it, and secondly, that the fact of registration of the bill of sale was proof that an affidavit had been filed at the same time with it.

It was then argued that the defendant must prove that the affidavit was true. But this is not required by stat. 24 & 25 *Vict. c. 134. s. 192. subs. 5.* The affidavit is to be taken to be true until the contrary is shewn, for the debtor must pledge his oath to the fulfilment of the conditions and will be liable criminally if he swears falsely.

LUSH J. concurred on both points.

Rule discharged.

(*a*) 6 *C. B. N. S.* 698.

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Tuesday,
June 23rd.

POWELL *against* HOWELLS and others.

Devise.
"In default
of such issue
of any of
them."
Cross re-
mainders.

Devise of one moiety of an estate to three nephews in equal shares in tail, "and in default of such issue of any of them" to *A. B.* in fee. Held, that cross remainders were to be implied.

EJECTMENT.

On the trial, before *Pigott B.*, at the *Glamorgan-shire* Spring Assizes, it appeared that the plaintiff was heir at law of *David Powell*, and the defendants claimed as his devisees. One of the questions was as to the estate which *David Powell* took under a second codicil of his aunt *Anne Davies*, made in 1832, as follows: "Whereas I have purchased a tenement and lands at *Treose*, in the parish of *Llangan*, since the making of my will and codicil; now I give and devise the same as follows, that is to say, one moiety thereof unto and between my three nephews, *William*, *Thomas* and *David Powell*, in equal shares, and the heirs of their bodies respectively lawfully begotten, and in default of such issue of any of them unto *Mary Powell*, widow, her heirs and assigns, for ever; and the remaining moiety unto *Jane*, wife of *Evan Gibbon*, for the term of her life, and after her decease unto and between her two sons *Edward* and *Evan Gibbon* equally and the heirs of their bodies lawfully begotten, and in default of such issue of both of them unto the said *Mary Powell* and her heirs for ever." *William Powell* died unmarried, having previously executed a disentailing deed and conveyed his share to *David*. *David* died, leaving the plaintiff his only son, and having executed a disentailing deed he

devised his own share and that of *William* to the defendant *Howells*. *Thomas* died unmarried, not having executed a disentailing deed.

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A verdict was entered for the defendants, with leave to move to enter a verdict for the plaintiff as to *Thomas Powell's* share of the first moiety if the Court should be of opinion that cross remainders were created by the limitations.

In *Easter* Term a rule was obtained accordingly.

Grove, Joshua Williams, J. W. Bowen and *G. B. Hughes* shewed cause.—The devise is of separate estates tail with separate estates in remainder. Cross remainders are not to be implied. “In default of such issue of *any* of them” is distributive. [They cited 2 *Jarman on Wills*, 510, 511, 3rd ed., citing *Anon. Dy.* 303 b; also *Holmes v. Maynell* (a), *Green v. Stephens* (b), per Lord Eldon, *Right d. Compton v. Compton* (c), *Doe d. Gorges v. Webb* (d), *Taaffe v. Conmee* (e), per Lord Cranworth, *Atkinson v. Holtby* (f).]

Giffard and *Michael*, in support of the rule.—“In default of such issue of *any* of them” means “if there be not issue of any of them.” The testatrix puts the entirety of the two moieties in two different courses of devolution.

BLACKBURN J. It is not easy to construe this codicil, though the question lies in a small compass; but

(a) *T. Raym.* 452; *S. C. nom. Holmes v. Maynell*, 2 *Show.* 136.

(b) 12 *Ves.* 419, 425; 17 *Ves.* 64, 75, 78-79.

(c) 9 *East* 266.

(e) 10 *H. L. C.* 64, 85.

(d) 1 *Taunt.* 234.

(f) 10 *H. L. C.* 313.

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applying the established rules of construction to the words. I think the testatrix left the first moiety of the property to her three nephews in equal shares with cross remainders between them, and not until those estates had expired to *Mary Powell*. The effect is that the plaintiff is entitled to recover one-third of that moiety. The words of the gift are "one moiety thereof"—which is important—"unto and between my three nephews" &c. "and in default of such issue"—if the codicil had stopped there, according to numerous cases the devise over to *Mary Powell* would not have taken effect until all the issue of each of the three nephews had failed, and cross remainders would have been implied; *Doe d. Gorges v. Webb* (a). If the words "in default of such issue" were applied to each of the nephews respectively, we must either hold that on the death of any one of these nephews there was a base fee in his share resulting to the heirs of the testatrix till the issue of all three failed, which we should be forced to cut down by interpolating the words "his share of the moiety" into the gift over, and we must put a strain on the language and hold that there was a devise of each share of the nephews to *Mary Powell* coming to her at different times and in a different manner. Therefore, there being one devise over of one estate to *Mary Powell*, we must hold that until all the heirs of the body of the nephews had died out the share of each passed to the others by cross remainders. As to the words "any of them," they are ambiguous; "in default of such issue of any of them" might mean "if no one of them has issue," and in that case the plaintiff would succeed; or they might mean "if any one of them has not issue," and then the difficulty which I have pointed out would

(a) 1 Taunt. 234.

arise, and we must interpolate words which would make three devises to *Mary Powell* instead of one. If there were express words in the codicil which rendered that interpolation necessary we should make it; but the words are ambiguous, and indeed may well and naturally in common parlance mean if none of the nephews have issue. And then the well established rule comes in aid that words may be interpolated to carry out the general intention of the testator. In construing the devise of the first moiety, I do not rely on the devise of the second, at the same time I cannot quite reject it; and it is clear that in that the testatrix intended *Mary Powell* only to take by cross remainders. That by looking to the terms of the devise of the second moiety the construction we give to the devise of the first appears to be according to the intention of the testatrix is however a satisfaction to one's conscience, rather than a legal reason for adopting it.

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LUSH J. The question is, what did the testatrix intend that *Mary Powell* should take, the entire moiety or the share of each nephew when his issue failed? I think not less than the entire moiety, nor in any event when she could not take the entire moiety. The devise to her of the first as well as the second moiety is in contemplation of its going over entire as it had been devised to the three nephews. In order to give the other construction we must interpolate words instead of construing ambiguous words consistently with the intention. The limitation to the issue of the nephews is subordinate to the general intent, and in order to carry that out we must construe the words as giving cross remainders.

Rule absolute.

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Thursday,
June 25th.

RATHBONE and others, appellants, MUNN,
respondent.

*City of London
Court.
15 & 16 Vict.
c. lxxvii. s. 8.
Judgment by
Deputy of
Judge.
Appeal.
County Courts
Act, 1867,
30 & 31 Vict.
c. 142. s. 13.
Retrospective
enactment.*

The County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 13.*, allows, with the leave of the Judge, an appeal from the decision of a County Court in actions in which an appeal was not before allowed. By sect. 25 the words "County Court" include the Courts held by virtue of The *London (City) Small Debts Extension Act, 1852, 15 & 16 Vict. c. lxxvii.* By sect. 8 of the latter Act, in case of illness or absence, the Judge may appoint a deputy. An action in which there could not have been an appeal before stat. 30 & 31 *Vict. c. 142.* was tried in the Sheriffs' Court by a deputy of the Judge in his absence, who took time to consider: the Judge on his return in *August, 1867*, read the decision of his deputy, but in order to give the defendants power of appealing, postponed the formal delivery of judgment until the 1st *January* following, when he delivered judgment and gave leave to appeal, and the parties not agreeing a case was stated by the deputy and signed by the Judge. Held,

1. That the judgment of the deputy was the judgment of the Court, and the postponement of its formal delivery made it a judgment of the 1st *January, 1867*.

2. That stat. 30 & 31 *Vict. c. 142. s. 13.* affected procedure, and not the rights of the parties, and therefore was retrospective, and gave an appeal in this action.

THIS was an action brought by the respondent on the 26th *July, 1867*, to recover from the appellants the sum of 5*l. 7s. 9d.* for money received by them to the use of the respondent, and the action was tried before the Common Serjeant of the city of *London* on the 16th *August, 1867*, who on that occasion sat for the Judge of the Sheriffs' Court, *London*, that being the Court in which the plaint in the action was entered.

The Common Serjeant took time to consider his judgment, and on the 30th *August* his written judgment was read by *Robert Malcolm Kerr, Esquire*, the Judge of the Sheriffs' Court, *London*. The judgment was for the respondent, but, the appellants desiring leave to appeal, the formal delivery of the judgment was postponed until after the 1st *January* then next, for the

purpose of giving the appellants leave to appeal under the 13th section of The County Courts Act, 1867, 30 & 31 *Vict. c. 142.*, which would then be in operation, and on the 1st *January*, 1868, the Judge gave judgment and leave to appeal accordingly.

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The question for this Court was, whether the respondent was entitled to recover?

The parties not agreeing upon the statement of the case, it was settled by the Common Serjeant, and signed by *R. Malcolm Kerr*, as Judge.

The County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 13.* enacts, "An appeal from the decision of a County Court on the same grounds and subject to the same conditions as are provided by sect. 14 of" stat. 13 & 14 *Vict. c. 61.* "shall be allowed in all actions of ejectment, and in all actions in which the title to any corporeal or incorporeal hereditament shall have come in question, and, with the leave of the Judge, an appeal shall be allowed in actions in which an appeal is not now allowed, if the Judge shall think it reasonable and proper that such appeal should be allowed."

Sect. 35. "The words 'County Court,' when used in this Act or in any future Act," "shall mean and include the Courts held by virtue of The *London* (City) Small Debts Extension Act, 1852, unless otherwise provided, and such Courts shall be holden by the name of The City of *London* Court, and shall be a Court of record, and its decisions shall be subject to appeal in the same way and on the same conditions as the decisions of a County Court are subject for the time being."

The *London* (City) Small Debts Extension Act, 1852, 15 & 16 *Vict. c. lxxvii. s. 8.*, enacts, "That in case of

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illness or unavoidable absence, not occasioned by his other official duties, the cause whereof shall be entered on the minutes of the Court, it shall be lawful for the Judge of the Court to appoint some other person, who shall have practised as a barrister at law for at least seven years, to act as the deputy of such Judge during such illness or unavoidable absence; and every deputy so appointed, during the time for which he shall be so appointed, shall have all the powers and privileges and perform all the duties of the Judge of the said Court."

O'Malley, for the respondent.—By The *London* (City) Small Debts Extension Act, 1852, 15 & 16 *Vict.* c. lxxvii. s. 78., there was no appeal in any cause of an amount not exceeding 20l.; and, the action having been commenced before the passing of stat. 30 & 31 *Vict.* c. 142., the case is not within sect. 13 of that Act.

First. The Common Serjeant who heard the case was alone competent to give judgment; the Judge of the Sheriffs' Court not having heard the case could not deliver the judgment of his deputy. By stat. 30 & 31 *Vict.* c. 142. s. 35. the Sheriffs' Court, which is one of those held by virtue of stat. 15 & 16 *Vict.* c. lxxvii., is put on the same footing as the County Courts; and sect. 13 of the later Act allows an appeal from the decision of a County Court subject to the same conditions as are provided by stat. 13 & 14 *Vict.* c. 61. s. 14.; but sect. 79 of stat. 15 & 16 *Vict.* c. lxxvii., as well as sect. 15 of stat. 13 & 14 *Vict.* c. 61., directs that the appeal shall be in the form of a case, and if the parties cannot agree the Judge "shall settle the case and sign it"; it should therefore be settled and

signed by the same person, whereas this case has been settled by the deputy and signed by the Judge. [*Lush J.* Has not the Judge of the Sheriffs' Court settled the case by his deputy? *Blackburn J.* The judgment of the deputy when adopted by the Judge is the judgment of the Court; the judgment of a Vice Chancellor is the judgment of the Lord Chancellor. When a puisne Judge of this Court tries a cause at the *Middlesex* or *London* sittings the trial is in law before the Lord Chief Justice, still if a bill of exceptions is tendered the Judge who tried the cause signs it.]

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Secondly. For all substantial purposes the cause was decided before stat. 30 & 31 *Vict. c. 142.* came into operation, and the Judge had no power to postpone the delivery of judgment in order to bring it within that statute. Even if he had power to do so that enactment cannot alter the condition of suitors in a cause then pending. The statute was passed on the 20th *August*, 1867, and the time of its coming into operation was purposely postponed until the 1st *January*, 1868. [He cited *The Attorney General v. Sillem, on appeal (a).*] [*Blackburn J.* referred to *Rex v. Wright, in error (b)* and *Wright v. Hale (c).*]

Quain (Beresford with him), for the appellants.—First. The Sheriffs' Court is a Court of record for the city of *London*. The date of the judgment when entered of record would be the 1st *January*, 1868, and cannot be questioned.

Secondly. The right to appeal affects only the mode of procedure, and therefore stat. 30 & 31 *Vict. c. 142.*

(a) 2 *H. & C.* 581.(b) 1 *A. & E.* 434.(c) 6 *H. & N.* 227. See *Kimbray v. Draper*, ante, p. 80. *Butcher v. Henderson*, ante, p. 403.

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s. 13. applies to actions then pending. [*Lush J.* Suppose judgment in ejectment on the 23rd *December*, 1867: could a party appeal under that section by giving notice of appeal on the 2nd *January*, 1868, which would be within the ten days limited by stat. 13 & 14 *Vict. c. 61. s. 14?*]

BLACKBURN J. We must hear the appeal. The case was heard by the deputy of the Judge of the Sheriffs' Court appointed under stat. 15 & 16 *Vict. c. lxxvii. s. 8.*, which enables the Judge of the Court in case of illness or unavoidable absence to appoint a deputy to act "during such illness or unavoidable absence." After his return the deputy could not deliver judgment; it must be delivered by the Judge of the Court and is the judgment of the Court. The Judge having read the written opinion of his deputy, was going to deliver judgment; but before he actually did so the defendants expressed a desire to appeal, and he postponed the formal delivery of the judgment until the 1st *January* following for the purpose of giving them an opportunity of appealing. He delivered it on that day, and gave leave to appeal in pursuance of the power conferred on him by stat. 30 & 31 *Vict. c. 142. s. 13.* That is a course which we cannot commend; it would have been better to have left the case to be dealt with according to the existing legislation; but we can only look to the date of the judgment.

Then comes the question, whether sect. 13 of stat. 30 & 31 *Vict. c. 142.* gives power to appeal in the case of an action pending at the time when the Act came into operation. The general rule of construction is settled, but there is difficulty in applying it. Acts of Parliament, when they alter the rights of parties are

not retrospective, unless they contain express words to that effect, but those which merely regulate the mode of procedure are retrospective unless a contrary intention appears. The test is, whether the enactment alters the rights of the parties or the mode of settling those rights. It appears to me that the power of appeal does not affect the rights of the parties, but only the mode in which those rights are to be ascertained. Before stat. 30 & 31 *Vict. c. 142.* came into operation, the rights of the parties in such a case as the present were determined by the Judge of the County Court without appeal;—since it came into operation, by the Judge of that Court subject to appeal to one of the superior Courts. Therefore sect. 13 applies, where the judgment has been delivered after the 1st *January*, 1868, in an action tried before that date.

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LUSH J. I was at first disposed to read the statement in the case as intimating that the Judge of the Sheriffs' Court had actually given judgment in *August*, 1867, and afterwards revoked it; but I do not dissent from my brother *Blackburn's* view, and therefore it must be taken that judgment was given on the 1st *January*, 1868. The postponement of the judgment for the purpose of giving a power of appeal was not a right thing to be done: for a Judge ought to deliver his judgment without regarding the consequences in the particular case. And I agree with my brother *Blackburn* that the Judge of the Court is the proper person to give judgment.

On the other point, after considerable doubt, I think that the giving a right of appeal from the judgment of a Court may be considered as relating to procedure

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rather than as affecting the rights of the parties, and therefore stat. 30 & 31 *Vict. c. 142. s. 13.* applies to an action then pending.

O'Malley did not support the judgment.

Judgment for the appellant.

Thursday,
June 25th.

9 & 10 *Vict.*
c. 93.
Right of
action.
Plea.
Accord and
satisfaction
with the de-
ceased.

READ *against* The GREAT EASTERN Railway Company.

1. Stat. 9 & 10 *Vict. c. 93.* gives to the personal representative of the person killed by the wrongful act, neglect, or default of another, not an independent cause of action, but a right of action, when there was a subsisting cause of action at the time of the death.

2. To a declaration on that statute, accord and satisfaction with the deceased in his lifetime is a good plea.

DECLARATION against the defendants as carriers for negligence in the management of their trains and engines whereby *Read*, who was a passenger on their railway, was thrown out and injured, of which injuries he afterwards died, and the plaintiff was the wife of *Read* at the time of his death, and there was neither executor nor administrator to him.

Plea. That in the lifetime of *Read*, and after the committing by the defendants of all the wrongs and breaches of duty in the declaration alleged, they paid to *Read* and he accepted and received from them a sum of money in full satisfaction and discharge of all the claims and causes of action which he had against the defendants for or in respect or by reason of the breaches of duty and other causes of action and matters of complaint in the declaration alleged and mentioned.

Demurrer, and joinder.

Stat. 9 & 10 *Vict. c. 93.*, "An Act for compensating the families of persons killed by accidents," sect. 1, after reciting that "no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him:" enacts, "That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

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Sect. 2. "Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct."

Sect. 3. "Provided always, and be it enacted, That not more than one action shall lie for and in respect of

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the same subject matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person."

Codd, for the plaintiff.—Under stat. 9 & 10 *Vict. c. 93*. a new cause of action arises on the death of the party injured. The claim of the widow and children under that statute is not barred by accord and satisfaction with the deceased. [*Lush J.* By sect. 3 not more than one action shall lie for the same subject matter of complaint.] That is, not one action for the widow and another for the children of the deceased. In *Blake v. The Midland Railway Company (a)*, where the argument for the plaintiff was that the party injured would, if he had recovered, have been entitled to a solatium, and therefore his representatives ought to be so upon his death, *Coleridge J.*, delivering the judgment of the Court, said, p. 110, "This Act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles." In *Pym v. The Great Northern Railway Company (b)* *Cockburn C. J.*, delivering the judgment of the Court, said, p. 767, "The condition" in sect. 1 "that the action could have been maintained by the deceased if death had not ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of. . . . But supposing the circumstances of the negligence to have been such that, if death had not ensued, the deceased might have brought his action in respect of any injury arising to him from it, we are of opinion that his repre-

(a) 18 *Q. B.* 93.

(b) 2 *B. & S.* 759.

sentative may maintain an action in respect of an injury arising from a pecuniary loss occasioned by his death, although that pecuniary loss would not have resulted from the accident to the deceased had he lived." And in the same case on appeal (a) *Erle C. J.* said, p. 406, "The statute, as appears to me, gives to the personal representative a cause of action beyond that which the deceased would have if he had survived, and based on a different principle. This was decided in the cases that have been referred to, *Franklin v. The South Eastern Railway Company* (b), in the Exchequer, and *Dalton v. The South Eastern Railway Company* (c), in the Common Pleas." [*Blackburn J.* I do not see that in either case it is said that the statute gives a cause of action *beyond* that which the deceased would have if he had survived. *Lush J.* The cause of action is beyond that which the deceased would have had if he had survived, in this sense, that the personal representative may recover damages which could not be recovered by him.]

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Phillbrick, contra.—Stat. 9 & 10 *Vict. c.* 93. *s.* 1. does not give an additional or independent right of action on the death of the party injured. The representative of the deceased cannot maintain this action, unless the deceased, if he had survived, could have maintained it; and in the present case the latter could not have done so for he had received a sum of money in full satisfaction and discharge of all the causes of action which he had against the defendants by reason of their wrongful act. In *Pym v. The Great Northern Railway Company* (d), *Cockburn C. J.*, delivering the judgment of the Court,

(a) 4 *B. & S.* 396.(b) 3 *H. & N.* 211.(c) 4 *C. B. N. S.* 296.(d) 2 *B. & S.* 759.

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p. 767, said, "If the deceased had, by his own negligence, materially contributed to the accident whereby he lost his life, as he, if still living, could not have maintained an action in respect of any bodily injury notwithstanding there might have been negligence on the part of the defendants, the present action could not have been supported." Suppose the deceased had brought an action in his lifetime and recovered damages for the loss of his business and income, the widow and children would have received compensation for the wrongful act of the defendants; and if this action also lies damages will be twice recoverable in respect of the same wrongful act.

Codd, in reply.—The present cause of action was not satisfied by the accord and satisfaction with the deceased, for until his death it did not become vested in the plaintiff. [*Blackburn J.* If so, the executor might bring an action in a case where the death did not follow till six years after the injury.] That must be the contention.

BLACKBURN J. This is a question of some difficulty on the construction of stat. 9 & 10 *Vict. c. 93. s. 1.*; there would however be no advantage in our taking further time for consideration. Before the passing of that Act a party might in his lifetime maintain an action for personal injury unless the compensation due to him had been satisfied by accord and satisfaction. But upon his death the cause of action ceased. In order to meet that state of the law stat. 9 & 10 *Vict. c. 93.* was passed, the preamble of which points to cases in which the wrongdoer had escaped from all liability in consequence of the maxim *actio personalis*

moritur cum personâ; and then follows the enactment. [His Lordship read sect. 1.] Taking the plea to be true, the act of the defendants was not "such as would (if death had not ensued) have entitled the party injured to maintain an action," for he had already received accord and satisfaction in respect of it. Sect. 2 regulates the action when it is maintainable, and directs the mode in which the damages are to be apportioned to the parties respectively for whose benefit the action is brought. It alters the action from that which was maintainable by the party injured, and the principles on which the damages are to be assessed are new, as is correctly said in *Blake v. The Midland Railway Company* (a) and *Pym v. The Great Northern Railway Company* (b); but the action is not new in the sense that there is an independent cause of action vested in the representatives of the deceased in their own right. Mr. Codd was driven to argue that the present right of action did not arise till the death of the deceased, and that although six years elapsed before the party died from the effects of the wrongful act, neglect or default, and although he in his lifetime recovered compensation, his executors might bring another action after his death. But that would be straining the words of the statute. I think it meant to say that, if the party injured had not in his lifetime received compensation, the defendant should be liable to an action by the executor or relatives for the loss which they had sustained from his death. Therefore this plea is good.

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LUSH J. The whole structure of the 1st section of stat. 9 & 10 Vict. c. 93. shews that the object of the

(a) 18 Q. B. 93. 110.

(b) 4 B. & S. 396. 406.

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Legislature was not to make the wrongdoer pay damages twice, or to give the representative of the deceased a new action, but to give a right of action to the representative when the deceased had not obtained compensation, and when there was at the time of the death a subsisting cause of action, which the maxim actio personalis moritur cum personâ prevented from being enforced. It is true sect. 2 gives a different measure of damages from that which prevails in the action by the party injured, but that does not affect the question of the right to bring a fresh action where the deceased has in his lifetime received compensation.

Judgment for the defendants.

[Thursday,
November
26th.]

IN THE EXCHEQUER CHAMBER.

WOODHOUSE *against* MURRAY.

*Bankruptcy
Act, 1861,
24 & 25 Vict.
c. 134. s. 73.
Act of bank-
ruptcy.
Assignment of
trader's pro-
perty.
Equivalent.*

By The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 73., if execution shall be levied by seizure and sale of the goods of a trader debtor, upon judgment in an action for a debt or money demand exceeding 50*l.*, he shall be deemed to have committed an act of bankruptcy from the date of the seizure: provided that, unless in the meantime a petition for adjudication of bankruptcy be presented, the sheriff shall proceed with the execution, and at the end of seven days after the sale pay over the proceeds to the execution creditor, who shall be entitled thereto, notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money received by the creditor shall be paid by him to the assignee under the bankruptcy. The plaintiff, trustee under a post nuptial settlement made by *P.*, recovered judgment in an action of covenant against him, and issued a fi. fa., under which, on the 5th *June*, his stock in trade and machinery were seized. The plaintiff withdrew the execution on *P.* assigning to him all his property: *P.* was then in insolvent circumstances, and ceased to carry on his trade. On the 12th *September* *P.* was adjudged a bankrupt. In an action against the creditors' assignee the jury found that the transaction between *P.* and the plaintiff was bonâ fide. Held by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that the assignment was invalid, as being fraudulent within the bankrupt law; and that it was not an equivalent, as, if the sheriff had sold, the creditors might have obtained an adjudication in bankruptcy within fourteen days, and then under sect. 73 the money would have been paid to the assignee in bankruptcy.

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THIS was an appeal from the decision of the Court of Queen's Bench making a rule absolute to enter a verdict for the defendant on the ground that the two deeds conveying all the property of the bankrupt constituted an act of bankruptcy. See 8 *B. & S.* 464.

The case was argued in *Trinity Vacation*, June 16, before KELLY C. B., BYLES and SMITH JJ., BRAMWELL and CHANNELL BB.

Quain (*R. G. Williams* with him), for the plaintiff.—It is sufficient to prevent the assignment of a debtor's property from being an act of bankruptcy that it is for an equivalent which is of present substantial value to the debtor, and may be for the benefit of the creditors. To hold that the mortgage and the bill of sale, which contained a proviso for redemption, were under the circumstances an act of bankruptcy, would discourage men in pecuniary difficulties from using their property for the purpose of relieving themselves from those difficulties. Here the object was, besides paying the debt, to prevent a sale under the execution, which would have been an act of bankruptcy by force of sect. 73 of The Bankruptcy Act, 1861, 24 & 25 *Vict. c.* 184. And there was no intention to defeat or delay creditors. [He cited *Pennell v. Reynolds* (a), *Bittlestone v. Cooke* (b) per Lord Campbell, *Whitmore v. Claridge* (c).]

Temple (*John Edwards* with him), for the defendant.—The debtor, though he had ceased to carry on his business, had trade debts which constituted him a

(a) 11 *C. B. N. S.* 709.(b) 6 *E. & B.* 296. 308.(c) 31 *L. J. Q. B.* 141.

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trader within the meaning of the bankrupt laws. Having ceased to carry on his business, the assignment followed by the withdrawal of the sheriff's officer could not enable him to carry it on, and therefore there was no equivalent. The assignment was a prospective advantage to the debtor and a present advantage to the particular creditor, but it deprived the other creditors of a contingent right under sect. 73 of The Bankruptcy Act, 1861, 24 & 25 *Vict.* c. 134. All the cases recognize that, to prevent an assignment of a debtor's property being an act of bankruptcy, there must be an equivalent to the creditors. *Bittlestone v. Cooke* (a) per Lord *Campbell*. Here the debtor in order to avoid an act of bankruptcy by the execution and sale of his goods under sect. 73 committed another act of bankruptcy.

Quain, in reply.—It is a sufficient equivalent that the debtor, though not carrying on business, is enabled to gain time for selling his property.

Cur. adv. vult.

KELLY C. B. now delivered the judgment of the Court.

The question in this case is whether a trader, against whom a judgment had been obtained for 10,000*l.* and upwards, under which the judgment creditor had levied between 3000*l.* and 4000*l.*, and afterwards sent in a second execution and seized for 6500*l.* and upwards, did by executing to the judgment creditor a mortgage of the whole of his estate and effects commit an act of bankruptcy. The jury have found that the mortgage

(a) 6 *E. & B.* 298. 308.

was bonâ fide, and executed to save expense, and to make the most of the property. But notwithstanding this finding we are of opinion that the trader did by executing it commit an act of bankruptcy.

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It is contended for the plaintiff, the judgment creditor, who sues the defendant, the creditors' assignee, for the value of the property seized, of which he had possessed himself, that although in general the assignment of all the estate and effects of a trader is an act of bankruptcy, yet it is not so where the debtor takes what has been called an equivalent; and *Bittlestone v. Cooke* (a) and other cases shew that where at the time of the assignment of the estate the debtor obtains a further advance of money, this advance may be deemed an equivalent. In the present case however there is no such equivalent, and so far as we can see no equivalent at all. The debtor had the choice of allowing the judgment creditor to sell the property seized, and by means of the proceeds to satisfy the judgment debt, or of executing this mortgage by which he assigns and transfers his estate and effects, instead of the proceeds of the sale, to the judgment creditor. By adopting this latter course he divests himself of the whole of his property and leaves not a single shilling to be applied in satisfaction of the claims of any one of his creditors. He in fact makes over the whole of his property to the one favoured creditor who has obtained the judgment, leaving nothing whatever for his other creditors. If he had allowed the law to take its course and the judgment creditor to sell the property which he had seized, any other creditor might under the 73rd section of The Bankruptcy Act, 1861, 24 & 25 Vict.

(a) 6 E. & B. 296.

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c. 134., have treated the seizure and sale as an act of bankruptcy, and by obtaining an adjudication within a fortnight would have enabled the creditors through the assignees in bankruptcy to recover the money, the proceeds of the sale, from the judgment creditor, and apply it to the use and benefit of the creditors at large.

In the state of the law before this statute, when seizure and sale under an execution were not an act of bankruptcy and the execution creditor was entitled to the proceeds upon the sale, it may have been indifferent as between the execution creditor and the other creditors whether the goods were sold under the execution or transferred by bill of sale to the execution creditor. But in the altered state of the law this is no longer so, and the plaintiff in this case clearly obtains by means of the bill of sale, as between himself and the other creditors, payment of his whole debt, and takes away all the property of the bankrupt which, if he had proceeded with the execution, would have been distributable among the general creditors under the bankruptcy.

In *Bittlestone v. Cooke (a)*, it is observed by *Crompton J.*, p. 311, "The old cases clearly established the rule that a conveyance of the trader's property, leaving it no longer in his option whether he would continue his trade, was in law an act of bankruptcy, as necessarily defeating his creditors. On this an exception has been engrafted, that the conveyance is not an act of bankruptcy, if it be for an equivalent." In the present case not only as already observed is there no new advance to constitute an equivalent, but there is no conceivable benefit whatever accruing to the creditors. It is said that the mortgage, by leaving the debtor in

(a) 6 E. & B. 296.

possession of his house and property, might enable him to carry on his business and retrieve his affairs; but here the debtor had ceased to trade two months before; and the saving of expense and the avoiding a sacrifice of the property by a forced sale, which seem to have induced the jury to treat the mortgage as *bonâ fide*, were a benefit only to the judgment creditor, as the mortgage, whatever might ultimately be the produce of the property, left absolutely nothing for the other creditors. If a transaction of this nature could be protected against the operation of the bankrupt laws, every debtor might at any time, by suffering a judgment and execution and then assigning the property seized to the judgment creditor, convey away the whole of his estate to this one favoured creditor and defraud every other creditor of the whole amount of his debt; the very evil which the 73rd section of The Bankruptcy Act, 1861, was enacted to prevent.

We are therefore of opinion that the assignees are entitled to this property, and that the judgment of the Court of Queen's Bench should be affirmed.

Judgment affirmed.

ROSSIE *against* BAILEY.

Friday,
July 3rd.

[Reported 8 *B. & S.* 748.]

BAZELEY *against* FORDER.

Friday,
July 3rd.

[Reported ante, p. 599.]

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1868.

Friday,
June 26th.

GRIFFIN and others *against* WEATHERBY and
HENSHAW.

Stamp.
Foreign bill.
17 & 18 Vict.
c. 83. s. 5.
Order for
payment
drawn in Isle
of Man.
Appropriation
of money.
Money had
and received.
Misjoinder of
defendants.
Common Law
Procedure Act,
1852, 15 & 16
Vict. c. 76.
s. 37.

Stat. 17 & 18 Vict. c. 83. s. 5. requires that every bill of exchange drawn out of the *United Kingdom* shall have an adhesive stamp affixed thereon before it is presented for payment, or is paid, or indorsed, transferred or negotiated. *H. J.*, in the *Isle of Man*, being indebted to the plaintiffs in *England*, gave them the following document addressed to the defendants:—"£600. *Douglas, Isle of Man*, 13th July, 1865. On the first day of *August* next please to pay Messrs. *G., M. & G.* or order six hundred pounds sterling, on account of moneys advanced by me for *The Isle of Man Slate and Flag Company, Limited*. *H. J.* To Messrs. *H. W. & J. H.*, official liquidators of the said Company." Notice of this order was sent to the defendants in *England* before *August* 1, and the defendant *H. W.* wrote an answer promising to honour the order on the 15th *August*. On the 15th *October*, 1866, he wrote admitting that he had received money applicable to the order, but stating that he had disposed of it in other ways. The defendant *J. H.* had never authorized the acts or letters of the defendant *H. W.* In an action against both defendants, Held,

1. That, there being no evidence against *J. H.*, the misjoinder should be amended under The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. s. 37., by striking out his name.
2. That the document was a bill of exchange.
3. That, though being drawn in the *Isle of Man* it was by stat. 19 & 20 Vict. c. 97. s. 7. to be deemed an inland bill, it was saved from the consequences of that enactment so far as stamp duties are concerned, and therefore was only liable to stamp duty under stat. 17 & 18 Vict. c. 83.
4. That it had not been presented or negotiated within the meaning of stat. 17 & 18 Vict. c. 83. s. 5., and therefore did not require to be stamped.
5. That the plaintiffs were entitled to recover in an action for money had and received the amount which the defendant *H. W.* admitted that he had received applicable to the debt of the Company to *H. J.*
6. A bill of exchange must be produced when presented for payment.

ACTION for money received and on accounts stated.
Plea, never indebted.

On the trial, before *Blackburn J.*, at the *Staffordshire* Spring Assizes, 1867, a verdict was found for the plaintiffs for 100*l.*, subject to the opinion of the Court on a special case.

Messrs. *Griffin, Morris & Griffin*, the plaintiffs, were artificial manure manufacturers at *Wolverhampton*, and the defendants were in *July*, 1865, official liquidators of

The Isle of Man Slate and Flag Company, Limited, which was then in course of being wound up.

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Henry Johnson, of *Douglas*, in the *Isle of Man*, had been managing director of the Company, which was indebted to him in a sum exceeding 600*l.*, and he, being indebted to the plaintiffs in a sum of 1000*l.*, had previously to *July*, 1865, placed in their hands as security for payment thereof certain shares in the Company, and certain bills of exchange drawn by them upon and accepted by a *Mr. Hicks*, of *Shrewsbury*, which bills were overdue and dishonoured.

The plaintiffs having pressed *Johnson* for payment, he on the 13th *July*, 1865, gave them the following document.

“*Douglas, Isle of Man*, 13th *July*, 1865.

“£600.

“On the first day of *August* next please to pay Messrs. *Griffin, Morris & Griffin* or order six hundred pounds sterling, on account of moneys advanced by me for *The Isle of Man Slate and Flag Company, Limited*.

“*Henry Johnson*.

“To Messrs. *Henry Weatherby* and *John Henshaw*, official liquidators of the said Company.”

This document was unstamped, and its admissibility in evidence and effect were to be determined by the Court, but the plaintiffs were to be at liberty to pay the penalty and stamp duty if the Court should determine that the document required a stamp, in the same manner as they might have paid it at *Nisi prius*, and on such payment the document might be received in evidence and read. At the time of the drawing of the document the defendants and plaintiffs were resident in *England*, and it was sent by *Johnson* to the plaintiffs in *England*.

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On the 15th *July* the plaintiffs' solicitors wrote to the defendant *Weatherby* the following letter. "We have received an order from Mr. *Henry Johnson* on you and Mr. *Henshaw* to pay our clients, Messrs. *Griffin, Morris & Griffin*, the sum of 600*l.* on the 1st *August* next, and on the other side we send you copy of the said order. We shall be obliged by your writing us by return of post, saying whether you and Mr. *Henshaw* will honour this order on the 1st *August*."

A copy of the order accompanied this letter, and on the 17th *July* the following answer was returned by the defendant *Weatherby*. "In reply to your letter I beg to state that it is not certain that I and Mr. *Henshaw* would be able to honour Mr. *Johnson's* order on the 1st *August*, but by the 15th *August* we may safely say that we shall be in a position to honour the order upon the same being duly presented to us by you."

The correspondence was continued, and in the meantime the debt of *Johnson* to the plaintiffs was reduced to 100*l.*, which was the sum they sought to recover in this action. On the 13th *October*, 1866, the plaintiffs' solicitors wrote to the defendant *Weatherby* requesting him to inform them whether he disputed his liability upon the order, and if so to name his attorney who would accept service of writ. To which he replied on the 15th *October*, 1866. "*Johnson's* order. I don't think I have at any time refused to recognize the fact that I have given my promise to honour this order as funds come to my hands on Mr. *Johnson's* account. I offered in *November* last to pay the remainder of the order then unpaid, viz. 100*l.*, when you stated you required 350*l.*; this I naturally refused to pay, and held the 100*l.* until

March last, when I disposed of it in other ways. Had I cash in hand I would pay it over without delay, but my co-liquidator looks to me to keep ourselves right, and as the affair is at present in our debt I cannot do so. But you may depend upon me clearing the order immediately it is in my power to do so."

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The defendant *Henshaw* had no knowledge whatever of any of the facts nor of the correspondence having taken place until after action brought, when he was informed of what had occurred by *Weatherby*. He had given no authority to *Weatherby* to act as his agent or on his behalf in the matter, nor had he in any way ratified his acts or the correspondence.

The Court had liberty to amend the proceedings in the event of a misjoinder of defendants in the same manner as they might have been amended at *Nisi prius*.

The question was, whether the defendants were liable to pay to the plaintiffs the sum of 600*l.* or any part of it.

Stat. 17 & 18 *Vict. c. 83. s. 1.* repealed the stamp duties then payable in respect of the instruments mentioned in the schedule; and in lieu thereof granted the duties specified in the schedule, among which is the following: "Foreign bill of exchange drawn out of the *United Kingdom*, and payable within the *United Kingdom*, the same duty as on an inland bill of the same amount and tenor."

Sect. 3. "The duties by this Act granted in respect of bills of exchange drawn out of the *United Kingdom* shall attach and be payable upon all such bills as shall be paid, indorsed, transferred, or otherwise negotiated within the *United Kingdom* wheresoever the same may be payable, and the said duties shall be denoted by

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adhesive stamps, to be provided by the Commissioners of inland revenue for that purpose, and to be affixed to such bills as hereinafter directed."

Sect. 4. "Every bill of exchange which shall purport to be drawn at any place out of the *United Kingdom* shall for all the purposes of this Act be deemed to be a foreign bill of exchange drawn out of the *United Kingdom*, and shall be chargeable with stamp duty accordingly, notwithstanding that in fact the same may have been drawn within the *United Kingdom*."

Sect. 5. "The holder of any bill of exchange drawn out of the *United Kingdom*, and not having a proper adhesive stamp affixed thereon as herein directed, shall, before he shall present the same for payment, or indorse, transfer, or in any manner negotiate such bill, affix thereon a proper adhesive stamp for denoting the duty by this Act charged on such bill; and the person who shall indorse, transfer, or negotiate such bill shall, before he shall deliver the same out of his hands, custody, or power, cancel the stamp so affixed by writing thereon his name or the name of his firm and the date of the day and year on which he shall so write the same, to the end that such stamp may not be again used for any other purpose; and if any person shall present for payment, or shall pay or indorse, transfer or negotiate any such bill as aforesaid whereon there shall not be such adhesive stamp as aforesaid duly affixed, or if any person who ought as directed by this Act to cancel such stamp in manner aforesaid shall refuse or neglect so to do, such person so offending in any such case shall forfeit the sum of 50*l.*; and no person who shall take or receive from any other person any such bill as aforesaid, either in payment or as a security, or by purchase or other-

wise, shall be entitled to recover thereon, or to make the same available for any purpose whatever, unless at the time when he shall so take or receive such bill there shall be such stamp as aforesaid affixed thereon and cancelled in the manner hereby directed."

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The Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97. s. 7., enacts: "Every bill of exchange or promissory note drawn or made in any part of the United Kingdom of *Great Britain and Ireland*, the *Islands of Man, Guernsey, Jersey, Alderney and Sark*, and the islands adjacent to any of them, being part of the dominions of Her Majesty, and made payable in or drawn upon any person resident in any part of the said *United Kingdom* or islands, shall be deemed to be an inland bill; but nothing herein contained shall alter or affect the stamp duty, if any, which, but for this enactment, would be payable in respect of any such bill or note."

The case was argued on *June 25, 26*, and judgment delivered on the latter day.

June 25, Holl, in the absence of *Macnamara*, for the plaintiffs; and *June 26, Macnamara*, by leave of the Court, continued the argument.—First. The document dated the 13th *July*, 1865, is not negotiable as a bill of exchange for it is made payable out of a particular fund: the meaning of it is "pay out of monies due to me from the *Isle of Man Slate and Flag Company*." In *Banbury v. Lisset and another* (a) *Lee C. J.* ruled at *Nisi prius* that an order on the defendants in favour of the plaintiff "on account of freight of the *Veale* galley *Edward Champion*, and this order shall be your sufficient

(a) 2 *Str.* 1211.

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 GRIFFIN [Blackburn J. There the payment was to be made out
 V. of an accruing contingent fund, viz., as freight became
 WEATHERBY. due : and *Lee* C. J. having left the question to the jury,
 they found it to be no bill of exchange on the ground
 of want of value received. *Lush* J. By stat. 55 G. 3.
 c. 184., Schedule, Part I., "All bills, drafts, or orders,
 for the payment of any sum of money out of any
 particular fund which may or may not be available, or
 upon any condition or contingency which may or may
 not be performed or happen, . . . if the same
 shall be delivered to the payee" are to be "deemed and
 taken to be inland bills, drafts, or orders, for the pay-
 ment of money within the intent and meaning of this
 Schedule." The document in question was such an
 order.]

Secondly. A bill of exchange drawn in the *Isle of Man* would have been a foreign bill before stat. 19 & 20 *Vict.* c. 97. s. 7., *Com. Dig. Navigation* (F 2.) (a), and though by that enactment it is to be deemed an inland bill, its liability to stamp duty is not altered. That statute was not passed for revenue purposes; and assuming the document in question to be a bill of exchange, it was with reference to the stamp duties drawn out of the *United Kingdom*, and is therefore only subject to the stamp duty imposed by stat. 17 & 18 *Vict.* c. 83. Stat. 31 G. 3. c. 25. s. 19., which enacts that no bill of exchange shall be given in evidence unless the paper on which it is written is duly stamped, and prohibits the stamping of bills of exchange after they have been drawn, does not apply to this bill; for under stat. 17 & 18 *Vict.* c. 83. s. 5. an adhesive stamp may be

(a) See *Ex parte Brown*, 5 B. & S. 280. 288.

affixed at any time. Also under The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125. ss. 28, 29.*, it might be stamped at the trial. [*Blackburn J.* referred to stat. 24 & 25 *Vict. c. 91. s. 32. Lush J.* The fiscal laws of a country cannot affect a foreign instrument until it is given in evidence in the Courts of that country.] Stat. 17 & 18 *Vict. c. 83. s. 5.* requires that an adhesive stamp shall be affixed if a bill drawn out of the *United Kingdom* is presented for payment or negotiated. And stat. 23 & 24 *Vict. c. 15. s. 12.* directs that when a bill having thereon an adhesive stamp is presented for payment the person to whom it is presented shall, upon paying it, cancel the stamp. But this bill was not negotiated nor presented for payment. [*Lush J.* Nor did the defendant *Weatherby* intend to accept it unconditionally.]

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H. James (*Huddleston* with him), for the defendants.—
 First. Stat. 55 *G. 3. c. 184.*, Schedule, Part 1., imposes stamp duties on “Foreign bills of exchange, drawn in sets according to the custom of merchants.” [*Blackburn J.* Those duties, if not repealed by stat. 17 & 18 *Vict. c. 83. s. 1.*, do not apply to bills of exchange drawn and payable in a foreign country: it would be impertinent to tax a foreigner in his own country. But a bill pretended to be drawn in a foreign country requires a stamp. *Lush J.* referred to *Snaith v. Mingay (a)*.] At all events stat. 17 & 18 *Vict. c. 83. s. 5.* requires that this bill should have an adhesive stamp affixed, for there was no promise to pay until it was presented for payment; and if not presented, it would not be evidence to

(a) 1 *M. & S.* 87.

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support an action for money had and received. Present-
 ment for payment may be made without the holder
 being present. [*Macnamara*. In *Byles on Bills*, 196,
 9th ed., it is said, "The bill or note ought to be exhi-
 bited, for it should be then and there delivered up."
Blackburn J. The term "present for payment" in
 sect. 5 means presented according to mercantile usage,
 which requires that the bill shall be produced; and
 until The Common Law Procedure Act, 1854, 17 & 18
Vict. c. 125. s. 87., if the bill was lost, an action could
 not be brought upon it by the loser however clear the
 evidence of the loss was. *Lush J.* The holder of the
 bill must present it at the usual residence or place of
 business of the drawee or acceptor, though it be known
 that he is not there.]

Secondly. There is no evidence to support an action
 for money had and received: the defendant *Weatherby*
 throughout the correspondence imposed the condition of
 the order being presented to him; though he admitted
 that at one time he had funds in his hands. [*Black-*
burn J. referred to *Carvalho v. Burn (a)* and *Walker v.*
Rostron (b).] The Common Law Procedure Act, 1852,
 15 & 16 *Vict. c. 76. s. 37.*, which allows the misjoinder
 of defendants to be amended, applies only where a party
 has been made defendant by inadvertence: here the
 document has been declared upon as a joint contract.

Macnamara was not called upon to reply.

BLACKBURN J. We ought to amend the record by
 ordering the name of the defendant *Henshaw* to be

(a) 4 B. & Ad. 382. 395.

(b) 9 M. & W. 411.

struck out on payment of his costs of the amendment, as there was no evidence against him. But the plaintiffs are entitled to judgment against the defendant *Weatherby*.

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The first question apart from the stamp objection is, whether the circumstances entitle the plaintiffs to recover in an action for money had and received. Ever since the case of *Walker v. Rostron* (a) it has been well established law and should not be disturbed, that where a debtor transfers to his creditor on account of a debt—whether due at the time or not is immaterial—his interest in a fund then in the hands of a third person, or about to come into his hands, and notifies the transfer to him, although the holder of the fund is not under any legal obligation to pay it to the transferee, yet if he promises to pay it to him, what was before an equitable right becomes a legal promise, and the money then in his hands, or as soon as it comes into his hands, is payable to the transferee, and an action for money had and received will lie for it. Here *Johnson* being indebted to the plaintiffs gave them this document, intending that the 600*l.* should be paid to them out of the moneys of the Company received by the defendants in the course of the liquidation of the Company's affairs, it was not intended as an unconditional order nor as a bill of exchange. There was also ample evidence that the defendant *Weatherby* promised to comply with the order when it should be duly presented to him, and that he had received sufficient funds for payment of the 100*l.* still remaining due. The defence, if any, is, that the plaintiffs did not present the order, and that the defendant *Weatherby* had applied

(a) 9 M. & W. 411.

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the money which came into his hands in payment of other debts—this however is no answer. There would be an answer if it could be shewn that *Johnson* did not give a legal order, for the defendant would be entitled to have the document delivered up to him on payment of the money, and it is clear that if the order was forged the payment by him would not be valid as against his principals. Also if by the revenue laws the document required a stamp, it would be the same as if there was no order. That brings us to the question whether this document is a bill of exchange requiring a stamp.

The contention for the plaintiffs was that it was not a bill of exchange, and in support of this was cited *Banbury v. Lisset (a)*, in which a document similarly worded was held to be an order upon a particular fund and not a bill of exchange. For the purpose of determining whether it requires a stamp we must look at the instrument itself, and, notwithstanding the opinion of *Lee C. J.*, I think that the words “on account of moneys advanced by me for *The Isle of Man Slate and Flag Company*,” are no more than a statement of value received, as if the party had said the Company are my debtors, and that is the reason why I call upon them to pay. The document so construed is a bill of exchange, not an order on a particular fund or payable upon a contingency.

Then does this bill of exchange require a stamp? Though by stat. 19 & 20 *Vict. c. 97. s. 7.* a bill drawn in the *Isle of Man* is for some purposes to be deemed an inland bill, it is still for revenue purposes a foreign bill. Before stat. 17 & 18 *Vict. c. 83.* no stamp was required on a foreign bill drawn out of and payable in

(a) 1 *Str.* 1211.

the *United Kingdom*. By sect. 3 of that Act, the duties granted in respect of bills drawn out of the *United Kingdom* shall be payable upon all such bills as shall be paid, indorsed, transferred, or otherwise negotiated within the *United Kingdom*, and shall be denoted by adhesive stamps. Therefore as soon as a bill drawn out of the *United Kingdom* is paid, indorsed, transferred, or otherwise negotiated within the *United Kingdom*, a stamp is required. Has either of these things happened to this bill? Sect. 5 directs that the holder of a bill drawn out of the *United Kingdom*, before he presents it for payment, or indorses, transfers, or negotiates it, shall affix the proper adhesive stamp, and the person who indorses, transfers, or negotiates it shall cancel the stamp; and by the same section any person who presents for payment, or pays or indorses, transfers or negotiates any such bill whereon there is not an adhesive stamp, or who ought to cancel the stamp and does not do so, is subject to a penalty. Stat. 23 & 24 *Vict.* c. 15. s. 12. requires the person to whom a bill having an adhesive stamp is presented when he pays it to cancel the stamp. Therefore when such a bill as this is paid or presented for payment, the party who pays it has a right to require a proper adhesive stamp to be affixed and cancelled; but this bill has not yet been paid, nor has it been presented for payment. I agree that the holder need not appear in person when the bill is presented for payment; but the bill must be produced. Here has indeed been sufficient notice and demand of payment, but no presentment according to mercantile usage. Again, has the bill been negotiated? Negotiating a bill means doing something which can only be done with a negotiable instrument. In *Sharpley v. Rickard* (a),

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(a) 2 H. & N. 57.

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LUSH J. There is abundant evidence that the defendant *Weatherby* promised to pay 600*l.* to the plaintiffs, provided he had so much in his hands after payment of other debts due from the Company. It is admitted that the amount owing to the plaintiffs has been reduced to 100*l.*, and that *Weatherby* had moneys in his hands applicable to the debt due from the Company to *Johnson*. Therefore if there is any legal evidence of an authority from *Johnson* to the defendant *Weatherby* to pay that money over to the plaintiffs, he is bound by his promise to pay it. That brings us to the consideration whether the document in question, which is the only authority from *Johnson* to pay money, can be read in evidence? It is in form a bill, draft, or order for the payment of money. [His Lordship read it.] It is objected that it is not a bill of exchange because it asks the defendants to pay out of a particular fund. But the words "on account of moneys advanced by me for the *Isle of Man Slate and Flag Company*" merely state the consideration for the request, and are equivalent to "value received." The test is this: Suppose the defendant *Weatherby* had simply assented to the request, would he have been liable to pay on the 1st *August*, whether he had funds of the Company in his hands or not? Clearly he would. Therefore this document is a

bill of exchange according to the law merchant, and under ordinary circumstances would require a stamp. But being drawn in the *Isle of Man*, stat. 19 & 20 *Vict. c. 97. s. 7.*, which enacts that it shall be deemed to be an inland bill, at the same time saves it from the consequences of that enactment so far as stamp duties are concerned and makes it the same as if drawn in a foreign country. Then have either of the conditions mentioned in sect. 5 of stat. 17 & 18 *Vict. c. 83.*, which imposes the stamp duty on foreign bills, been fulfilled? Sect. 5 subjects every person to a penalty who presents for payment, or pays or indorses, transfers or negotiates such a bill, on which there is not an adhesive stamp. Has this bill been dealt with so as to require a stamp? Has it been presented for payment? The phrase "present for payment" must be used in sect. 5 with reference to known mercantile usage, and must mean a presentment which would be sufficient to charge third parties collaterally liable on the bill; the bill itself must be produced so that it may be delivered up if paid. This bill has not been so presented. Nor has it been negotiated, that is, passed away from the original holder to some other person. It has never been out of the possession of the plaintiffs. Therefore no event on which sect. 5 imposes the stamp duty has happened, and we may read the document without a stamp and as proof of authority from *Johnson* to the defendant *Weatherby* to pay the money.

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Judgment for the plaintiffs.

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Friday,
June 26th.

WILLIAMS *against* EARLE.

Lease.
Covenant
running with
land.
Covenant:
not to assign
without li-
cence: to
repair: to
renew tenant's
fixtures.
Action against
assignee with
licence.
Damages.

The first count of the declaration was upon a covenant in a lease that the lessees and their assigns would maintain and keep in repair the forge and buildings demised and all buildings which should be erected during the demise, and all additions and improvements thereto, and would maintain and keep in good working order the fixtures, steam engines, &c., tools, utensils, and other articles demised, and also which might during the demise be brought or set up on the premises, and would replace and make good all such fixtures, engines, &c., tools, utensils, and other articles as should be broken or worn out. The second count was upon a covenant that neither the lessees nor their assigns would assign or part with the possession of the demised premises without the consent in writing of the lessor.

As to the first count.

Held. 1. That so much of the covenant as related to buildings and to machinery, tools and utensils, which were tenant's fixtures, ran with the land. But

2. That so much of it as related to tools and utensils, which were not fixtures, did not run with the land.

3. That the assignee was not liable on this count for breaches of the covenant after an assignment by him without the consent of the lessor.

As to the second count.

Held. 4. That the covenant ran with the land and bound an assignee to whom the premises had been assigned with the consent of the lessor.

5. That the lessor could recover damages indirectly in respect of those breaches of covenant which had already occurred, and future breaches; the measure of the damages being such a sum as would, so far as money could, put the plaintiff in the same position as if he had retained the liability of the defendant instead of having an inferior remedy against a person less able to perform the covenants or compensate for breaches of them.

THIS was an action brought by the plaintiff as lessor against the defendant as assignee of a lease by deed to recover damages for breaches of the covenants after mentioned.

The first count of the declaration was on a deed dated the 21st *February*, 1859, between the plaintiff, mortgagee, of the first part, *J. Kirkman*, mortgagor, of the second part, and *H. Carmont*, *W. Carmont* and *W. Corbett* of the third part, whereby the plaintiff demised and *Kirkman* demised and confirmed unto the

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lessees, their executors, administrators and limited assigns, certain land, together with the erections and buildings thereon, and all the engines, boilers, mill gearing, millwright work, hammers, cranes, tools, plant, fixtures, machinery, utensils, apparatus and effects in and about the premises, and specified in the schedule thereunder written, together with the appurtenances, to hold unto the lessees, their executors, administrators and limited assigns, from the 25th *March* then next, for the term of fourteen years determinable as therein mentioned, at the yearly rent of 330*l*. And the lessees did thereby for themselves, their heirs, executors, administrators and assigns, covenant with the plaintiff and *Kirkman* separately for payment of the rent. And further, that they the lessees, their heirs, executors, administrators and assigns, would from time to time, and at all times during the continuance of the demise, well and sufficiently maintain and keep the forge, furnaces and other buildings, walls and fences thereby demised both inside and outside, and all erections and buildings, and improvements (if any) which should during the continuance of that demise be erected on the land thereby demised, and all additions and improvements thereto respectively (except main walls and principal timbers) in good and tenantable order, repair and condition, and also would at all times during the continuance of that demise well and sufficiently maintain and keep the fixtures, steam engines, boilers, shafting, gearing, pipes, furnaces, cranes, plant, tools, utensils and other articles and things expressed to be thereby demised, and also which might at any time or times during the continuance of that demise be brought or set up upon

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or in the land, buildings and premises, or any of them, and all additions and improvements thereto respectively, in good and complete working order, repair and condition, and also would from time to time replace and make good all such fixtures, engines, boilers, shafting, gearing, pipes, hammers, cranes, machinery, tools, plant, utensils and other articles, matters and things as should from time to time be broken or worn out immediately after the same should be so broken or worn out. And moreover that they the lessees, their heirs, executors, administrators and assigns, or any of them, would not without the previous written consent of the plaintiff or *Kirkman*, pull down or remove, or permit to be pulled down or removed, all or any of the fixtures, doors, walls, windows or floors of or belonging to the demised premises, or any building or buildings to be thereafter erected on the plot of land thereby demised, nor the then present or any future engine, boilers, shafting, gearing, fixed or moveable machinery, plant, hammers, cranes, tools or utensils then at or upon the demised premises, nor do or commit or permit any other wilful or voluntary waste, spoil or destruction in or upon the demised premises or any part thereof.

The second count was on a further covenant contained in the lease that they the lessees, their executors, administrators or assigns, or any of them, would not assign over, underlease or underlet or otherwise part with the possession of the demised premises or any part thereof or of that lease, without first obtaining the consent in writing of the plaintiff or of *Kirkman*, and then only for such time and in such manner, and under and subject to such restrictions as should be expressed in that consent.

Plea, to the first count. That the defendant before any of the breaches assigned all his interest in the lease. Issue.

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Demurrer to the second count on the ground that the covenant of the lessees not to assign without licence did not bind the defendant as assignee. Joinder.

The cause came on to be tried at the *Manchester* Spring Assizes, 1867, when by consent a verdict was found for the plaintiff subject to the opinion of this Court on a special case to be stated by an arbitrator who should also assess the damages, but they were not to be assessed till after the decision of the Court on the special case, in order that the Court might if necessary direct the principle upon which the same should be assessed.

A special case was stated accordingly.

The plaintiff was the mortgagee and lessor, and *J. Kirkman* was the mortgagor of the premises referred to in the lease and the declaration. The plaintiff as mortgagee demised the premises, and the mortgagor was also a party to the deed and demise. The lessees' covenants were made separately with the mortgagee, his heirs and assigns, and with the mortgagor, his heirs and assigns. The defendant was the person to whom, under a licence signed by the plaintiff and *Kirkman*, in pursuance of the lease, the premises were assigned by a deed between the lessees and the defendant, dated the 25th *July*, 1860, subject to the payment of the rent and to the performance of all the covenants by and in the indenture of lease reserved and contained. The defendant took possession of the premises under the assignment but never executed it.

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The mortgage between the plaintiff and *Kirkman* was dated the 19th *July*, 1858.

The mortgagor was suffered by the plaintiff to remain in receipt of the rent of the premises. The plaintiff was requested by the mortgagor to allow this action to be brought, and it was brought in his name in consequence of that request.

At the date of the lease the works on the premises were constructed as a forge for forging iron, but afterwards with the consent of the mortgagor, the lessees, by way of improvement, adapted the premises to the purposes of rolling iron, and set up at a great expense rolling mills, machinery, fixtures and moveable effects upon the premises and made alterations and additions and improvements therein for the purpose of rolling iron, being assisted by large pecuniary advances made to them by the defendant; and they continued in the occupation of the premises for about a year and a half after the making of the lease. Some of the improvements, machinery, fixtures and moveable effects set up by the lessees were set up in lieu of and in substitution for machinery, fixtures and effects demised by the lease, which had become worn out, or been removed by the lessees for the purpose of making those alterations, additions and improvements.

After the advances by the defendant, it was found to be necessary for the lessees to compound with their creditors and to give up their works and the lease. The assets of the lessees showed 6s. in the pound, and the defendant paid the other creditors of the lessees 10s. in the pound, and took to the premises in consideration of that payment.

After the defendant became assignee he continued to carry on the business, and at great expense set up other rolling mills, machinery, fixtures and moveable effects upon the premises, and made great alterations, additions and improvements therein.

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Some of the rolling mills, machinery, fixtures and moveable effects set up by the defendant were set up in lieu of and substitution for machinery, fixtures and effects demised by the lease or set up by the lessees, or which had become worn out or been removed by the defendant for the purpose of making those alterations, additions and improvements.

At *Christmas*, 1865, the defendant found it necessary to and did discontinue the business; and offered to the mortgagor to surrender the premises, together with the improvements, machinery, fixtures and moveable effects which were then on the demised premises, to be taken at a valuation, which offer was declined by the mortgagor.

On the 27th *September*, 1866, the defendant, without the licence or consent of the mortgagee or mortgagor, and with a view to get rid of further liability as assignee, assigned the lease and premises to *J. Banks*.

The defendant whilst he was assignee, and before and after he discontinued the business, and before and after he assigned the premises to *Banks*, took down and removed from the premises (1.) machinery, fixtures and moveable effects which were thereon at the time of the making of the lease; (2.) improvements, machinery, fixtures and moveable effects which had been set up thereon by the lessees; (3.) improvements, machinery, fixtures and moveable effects which had been set up

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thereon by himself; (4.) improvements, machinery, fixtures and moveable effects set up by the lessees and the defendant in lieu of and in substitution for machinery, fixtures and effects which were upon the premises at the time of the lease.

The defendant had not replaced all the machinery, fixtures and effects so as to restore the premises to the same state and condition as they were in at the time of making the lease.

All the rent due up to the date of the assignment by the defendant was paid before the commencement of this action, but none of the rent due since the assignment had been paid by the defendant or any other person.

The defendant had committed a breach of the covenants to maintain and keep in good order, repair and condition, and to replace and make good, and of the covenant not to pull down or remove, or to permit to pull down or remove, and of the covenant not to do, commit or permit waste, spoil or destruction.

The pleadings and documents referred to were to be taken as part of the case.

The questions for the opinion of the Court were: First. Whether the plaintiff was entitled to recover on any of the breaches in the declaration. Secondly. If the Court were of opinion that the plaintiff was so entitled, upon what principle and in respect of what breaches damages were to be assessed.

Holker (*Gorst* with him), for the plaintiff.—The principal question is that raised on the demurrer to the second count. The defendant having entered into

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possession of the premises under the assignment to him, subject to the payment of rent and performance of the covenants in the lease, is liable for a breach of the covenant not to assign without leave. The breach was committed after the passing of stat. 22 & 23 *Vict. c. 35. s. 1.* and stat. 23 & 24 *Vict. c. 38. s. 6.*, which alter the law in *Dumpor's Case (a)*. A covenant not to assign is within the first resolution in *Spencer's Case (b)*: "When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words." Here, however, the assigns are named, and therefore the covenant is also within the second resolution, 5 *Co. 16 b*, for it touches or concerns the thing demised as much as a covenant for quiet enjoyment or for further assurance, or a covenant to renew a lease. [He cited *Paul v. Nurse (c)*, per Bayley J., *Hooper v. Clark (d)*. [*Lush J.* In *The Mayor &c. of Congleton v. Pattison (e)* it was held that the covenant, in order to run with the land and bind the assignee, must be beneficial to the estate and immediately affect the land itself or the mode of enjoying it.]

Also the covenant to repair, maintain and replace machinery worn out runs with the land. [*Lush J.* referred to *Minshull v. Oakes (f)*.] But it is admitted that the defendant is not liable for a breach of the covenant to pay rent committed after the assignment.

(a) 4 *Co.* 119 b.(b) 5 *Co.* 16 a; 1 *Smith L. C.* 45, 6th ed.(c) 8 *B. & C.* 486, 489.(d) 8 *B. & S.* 150.(e) 10 *East* 130.(f) 2 *H. & N.* 793.

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As to the measure of the damages. On the breach of the covenant not to assign without leave, the measure of damage is the amount of rent which would have been payable by the defendant if he had remained in possession and had not assigned. On the other breaches, the measure of damage is the difference between the value of the works at the time of the commencement of the action, and what would have been their value had those breaches never occurred.

Jones (Herschell with him), for the defendant.—The covenant not to assign does not touch or concern the land demised, nor affect the nature, quality or value of the estate nor the mode of occupying the land; but it destroys the relation subsisting between the lessor and lessee. A covenant that *A.* and his *assigns* will not part with the premises without the licence of the lessor seems to be a contradiction in terms. [*Blackburn J.* Before stat. 22 & 23 *Vict. c. 35. s. 1.* the covenant would have been destroyed if one licence to assign had been granted; therefore it is not surprising that under that state of things this question should not have arisen.] It was mooted in *Lucas v. How (a)*, where in the margin *Pennant's Case (b)* and *Collins v. Sillye (c)* are referred to. In *Pennant's Case*, which was ejectment for forfeiture, the defence being that there had been a waiver by acceptance of rent, the first point resolved was "that the condition being collateral, the breach of it might be so secretly contrived as to be impossible for the lessor to come to the knowledge of it, and therefore notice in this case is material and issuable, for otherwise the lessee would take advantage of his own fraud, for he might

(a) *T. Raym.* 250.

(b) 3 *Co.* 64 a.

(c) *Sty.* 265.

make the grant or demise so secretly, and so near the day on which the rent is to be paid, as to be impossible for the lessor to have notice of it." [*Blackburn J.* The condition is said to be collateral in the sense that the landlord would not necessarily know when there was a breach of it.] In *Collins v. Sillye* (a), after the lessor had entered into part of the land, the lessee assigned the remainder of his term in the rest of the land without the consent of the lessor, and *Rolle C. J.* held that an action for breach of covenant not to assign would lie, for the covenant was collateral, and therefore broken by the assignment, notwithstanding the lessor's entry into part of the land: it was treated as a personal covenant or a covenant in gross. [*Blackburn J.* A covenant may be both personal and yet run with the land, as a covenant to pay rent.] In *Bally v. Wells* (b), which was an action on a covenant by the lessee of tithes not to let any of the farmers in the parish have any part of the tithes, there was a repetition of the doctrine in *Spencer's Case* (c), and a distinction was taken between an act to be done on the land and an assignment of the lease: it was said, "a covenant not to assign generally, must be personal and collateral, and can only bind the lessee himself, there never can be any assignee; whereas the present lease grants to executors, administrators and assigns." [*Lush J.* In *Tatem v. Chaplin* (d) a covenant by the lessee to reside upon the demised premises was held binding upon his assignee though not named. How does that differ from a covenant not to assign?] That was in

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(a) *Sty.* 265.(b) 3 *Wils.* 25. 33; *Wilmot's Opinions and Judgments*, 341. 351. See *Brewer v. Hill*, 2 *Anstr.* 413. 417.(c) 5 *Co.* 16 a.(d) 2 *H. Bl.* 133.

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effect a covenant that the house should be kept in good condition by constant residence in it; the covenant referred to the mode of occupation, and was personal to the lessee. [*Lush J.* This is a covenant not to deal with the land by parting with it, without obtaining the licence of the lessor.] None of the other covenants are disturbed by a breach of this. [*Lush J.* referred to *Doe d. Cheere v. Smith (a)*.] In that case *Rogers*, the lessee, became bankrupt, and his assignees took to the lease and assigned it to *P.*, who assigned it to *Rogers*; *Rogers* underlet to the defendant, and on ejectment for forfeiture it was held that a lessee was absolved by the Bankrupt Act from all the covenants in the lease, and that the underletting by *Rogers* after the assignment to him was not an act by him as lessee, and therefore no forfeiture. [*Lush J.* The assignees of a bankrupt take by operation of law; therefore that case does not touch the present question. *Blackburn J.* There the covenant in the lease was that *Rogers*, his executors or administrators, would not assign or underlet: *assigns* were not mentioned.] *Paul v. Nurse (b)* was an action on a covenant against assignees for nonpayment of rent, and the dictum of *Bayley J.*, p. 489, "The plaintiffs' remedy is by an action on the covenant not to assign," contemplates an action against the original lessee who had assigned without the consent of the lessor. [*Blackburn J.* He must have so meant; but it is not a decision on the point.] The policy of the law is in favour of the liberty of the lessee to assign. [*Lush J.* referred to stat. 32 *H. 8. c. 34. s. 1.*] Further, the breach by the second assignee was not complete till the estate had passed out of him, and the law holds the assignee liable only for breaches of covenant committed

(a) 5 *Taunt.* 795.(b) 8 *B. & C.* 486.

so long as his estate endures. [*Blackburn J.* But the act of assigning is done while the estate is in the assignor. A man who commits suicide does the act during his life.]

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As to the damages for breaches of covenant since the assignment. The plaintiff is only entitled to recover what he is not able to get from year to year from the assignee. [*Blackburn J.* The damages must be assessed once for all.] The covenants are mutual and independent; *Platt on Covenants*, 90, 100, *Hays v. Bickerstaffe (a)*, *Boone v. Eyre (b)*. [*Blackburn J.* referred to *Pordage v. Cole (c)*.] The covenant declared upon in the first count does not operate on chattels, nor on trade fixtures which are removable by the tenant; *Sumner v. Bromilow (d)*. [*Blackburn J.* That case turned entirely on the construction of the covenant in the lease: the language of the covenant in this lease is different.]

BLACKBURN J. This is an action by the lessor against the assignee for breach of covenants in a lease. The rule has been well established since the second resolution in *Spencer's Case (e)* that covenants in a lease which are in express terms on behalf of the lessee and his assigns with the lessor and his assigns, and which relate to and touch or concern the land, run with the land; and, there being privity of estate between the assignee and the lessor, the lessor may sue the assignee for breach of any of them.

In this lease there is a covenant by the lessees for themselves and their assigns that neither they nor their assigns will assign the lease without the licence of the

(a) 2 *Mod.* 34; *S. C. Hayes v. Bickerstaff*, *Freem.* 194; *Vaugh.* 118.

(b) 2 *W. Bl.* 1312, 1314, note (t).

(c) 1 *Wms. Saund.* 319 l., 6th ed.

(d) 34 *L. J. Q. B.* 130.

(e) 5 *Co.* 16 a; 1 *Smith L. C.* 45, 6th ed.

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mortgagor and mortgagee; and, the defendant, the assignee, having assigned without their licence, the first question is whether that is a covenant which runs with the land and therefore binds the defendant. I have been unable to perceive any reason why it should not be considered a covenant touching and concerning the land. It is inserted for the benefit of the landlord, so that he may have a voice as to who should be substituted for the original lessee in the occupation of the premises. It materially touches the interest of the landlord as well as the status of the tenant, as much as a covenant by a lessor to renew at the end of the term, which in the judgment of the Court in *Roe d. Bamford v. Hayley* (a) was mentioned as having been adjudged to run with the land, and to bind the grantee of the reversion (b), or a covenant to reside upon the demised premises, which in *Tatem v. Chaplin* (c) was held to bind the assignee though not named. In *Bally v. Wells* (d) a covenant not to let any of the farmers in the parish have any part of the tithes demised without the consent of the lessor, which is very nearly akin to the covenant in question, was held to run with the tithes and bind the assignee, assigns being mentioned in it. The Court indeed used expressions, 3 *Wils.* 83, with reference to a covenant "not to assign generally," as if it could not run with the land; but their meaning was, that such a covenant is gone so soon as the lessee assigns, whether the assignment be with or without licence. Where however the lessee covenants for him-

(a) 12 *East* 464. 469.

(b) *Moore* 159, pl. 300, "which is evidently *Spencer's Case*," per Curiam in *Minshull v. Oakes*, 2 *H. & N.* 793. 808.

(c) 2 *H. Bl.* 133.

(d) 3 *Wils.* 25; *Wilmot's Opinions and Judgments* 341.

self and his assigns that he and they will not assign *without licence*, the covenant will run with the land on each assignment, *toties quoties*. Therefore upon principle and authority this covenant runs with the land, and consequently the defendant is liable for the breach of it.

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Nevertheless the assignment is operative at law, and, the estate having passed from the defendant to *Banks*, the breaches of covenant committed since are not breaches for which the defendant is liable on the first count. The remedy on the covenants is against the new tenant *Banks*. The plaintiff can, however, on the second count, indirectly obtain damages; and on this the arbitrator may wish to have our direction. If the covenant not to assign had been observed by the defendant, he would have remained liable to the plaintiff for the performance of the covenants the breaches of which are alleged in the first count; and if he continued solvent the plaintiff would have had a complete remedy. But, the defendant having assigned to a person who no doubt is selected because having nothing to lose he is willing to incur the liability under the covenants, the plaintiff has an inferior remedy against a person less able to perform the covenants or compensate for the breaches of them, and the arbitrator in assessing the damages on the second count should take into consideration in how much worse a position the plaintiff will be, both in respect of breaches of covenant which have already occurred and future breaches, than he would have been in if he had retained the liability of the defendant; and should, so far as money can do it, put the plaintiffs in the same position as if the covenant not to assign had not been broken.

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That will be a complicated and difficult matter ; but it may be much simplified by the parties agreeing that the lease shall be surrendered to the plaintiffs so as to relieve the arbitrator from any inquiry as to future breaches.

There are some further questions for the consideration of the arbitrator in assessing the damages on both counts. It appears that with the premises were demised not only fixtures but moveable things, such as tools, utensils, and other articles mentioned in the schedule to the lease. And there is a covenant to maintain and keep in good and working order the fixtures and other things, and replace and make good such of them as should be broken and worn out. So far as that covenant relates to fixtures, it touches or concerns the land, and runs with the land ; and for any breach of it committed during the defendant's time he will be liable on the first count, and any breach of it committed during *Banks's* time after the assignment will be taken into account in assessing the damages against the defendant on the second count. For instance, the maintaining and keeping in good order a boiler or any other thing fixed to the land, though the tenant might be able to remove it at the end of the term, would relate to the occupation and enjoyment of the land, and this covenant would run with the land. But in respect of mere chattels, such as a hammer or spade, this covenant does not run with the land ; and in respect of them the plaintiff cannot recover in the present form of action. If the parties are wise they will agree that the arbitrator shall settle all matters in difference.

LUSH J. concurred.

Judgment for the plaintiff (a).

(a) See the next case.

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WEST *against* DOBB.[Monday,
May 31st,
1869.]

A lease of premises for fourteen years contained a covenant by the lessees, not expressed to be on behalf of their assigns, not to assign or part with the possession without the written consent of the landlord. The landlord, by a letter addressed to the lessees, assented to a transfer of the lease to *W.* on the same terms as those on which they held it. *W.* entered into possession without any formal assignment, and afterwards by the written licence of the landlord assigned to trustees for *W.*'s creditors, who, without the consent of the landlord, sold the term to the defendant. In ejectment on the ground of forfeiture,

1. *Quære*, whether the covenant ran with the land?
2. The covenant was not broken by the lessees parting with the possession to *W.* without executing a transfer of the lease.
3. The unlicensed parting with the possession by the trustees of *W.* to the defendant was not a breach of covenant by the lessees.

Lease.
Covenant
running with
land.
Covenant not
to assign
without licence.
Parting with
possession
without trans-
ferring the
lease.
Parting with
possession by
cestui que
trust.

THIS was an action of ejectment tried before *Blackburn J.* during the Spring Assizes, 1868, at *Bodmin*.

It appeared on the trial that the plaintiff had in 1860 demised the premises in question for fourteen years to *Tanner* and *Pridham*. The lease contained various covenants by the lessees not expressed to be on behalf of their assigns, and amongst others a covenant not to assign or part with the possession of the demised premises without the written consent of the landlord. And there was a clause of re-entry in case of the breach of any of the covenants. As the term had not expired by efflux of time, the question at the trial was whether it had been forfeited or not.

The facts were not disputed. The plaintiff, by a letter addressed to *Tanner* and *Pridham*, dated the 25th *March*, 1865, assented to a transfer of the lease by them to one *Wade* on the same terms as those on which they held it. *Wade*, who had purchased the term

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from them, entered into possession without having any formal assignment of the term. *Wade* continued in possession paying rent until 1867, when, by the written licence of the plaintiff, he assigned inter alia all his interest in the lease to *Chirgwin* and *Hamilton* as trustees for his creditors.

It appeared that the plaintiff had assented to this transfer under the belief that by an arrangement between the trustees and *Wade* the family of *Wade* were to be allowed to continue in possession, but the trustees, taking a different view of the matter, sold the term to the defendant, and the defendant entered into possession.

Two grounds of forfeiture were relied on. First, the unlicensed parting with the possession by the trustees, *Chirgwin* and *Hamilton*, to the defendant; and secondly, the parting with the possession by the original lessees, *Tanner* and *Pridham*, to *Wade*, without executing a transfer of the lease, so as to make him an assignee, and as such bound by all such covenants as run with the land.

A nonsuit was directed, reserving leave to enter a verdict for the plaintiff.

In *Easter* Term, *Kingdon* obtained a rule nisi accordingly.

The rule was argued, in *Hilary* Term, *January* 13, 1869, before COCKBURN C. J., BLACKBURN and MELLOR JJ.

Pinder (*Cole* with him), for the defendant.—First. A covenant by the lessee, his executors and administrators, not to assign, is a personal covenant only, and does not run with the land; and therefore *Chirgwin* and *Hamilton* were not bound by this covenant. In *Williams*

v. *Earle* (a) assigns were named in the covenant. [He cited *Seers v. Hind* (b) per Lord *Thurlow*, *Roe d. Gregson v. Harrison* (c) per *Ashurst J.*, *Doe d. Cheere v. Smith* (d), *Paul v. Nurse* (e) per *Bayley J.*, 2 *Platt on Leases*, 264-5, 2nd ed., 5 *Davidson Precedents in Conveyancing*, 179, note (c), 2nd ed., *Woodfall Land. and Ten.*, 550, 9th ed.]

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Secondly. There was no legal assignment from the lessees, *Tanner* and *Pridham*, to *Wade*, and therefore the assignment to the defendant by *Chirgwin* and *Hamilton*, who had only an equitable interest, could not operate as a breach of the covenant. In *Doe v. Payne* (f), which was ejectment on a clause of re-entry contained in a lease to *Dyer* for breach of his covenant "not to assign, set over, or otherwise let the demised premises," it was proved that the defendant, a stranger, was in possession of the premises, and asserted that they were demised to him by another stranger, and Lord *Ellenborough* said, p. 87, "This does not prove that *Dyer* either assigned or let, and it is incumbent on the lessor of the plaintiff to shew that he did either the one or the other. . . . This evidence would not be sufficient even though *Dyer* had covenanted not to part with the possession." *Wade*, having the equitable interest, had the power to dispose of it without the consent of *Tanner* and *Pridham*, and they are not responsible for the act of the cestui que trust.

Kingdon and *Charles* for the plaintiff.—First. A covenant not to assign, though the assigns be not named, runs with the land ; first resolution in *Spencer's Case* (g).

(a) See the preceding case.

(b) 1 *Ves.* 294-5.(c) 2 *T. R.* 425. 429.(d) 5 *Taunt.* 795.(e) 8 *B. & C.* 486. 489.(f) 1 *Stark.* 86.(g) 5 *Co.* 16 a ; 1 *Smith L. C.* 45, 6th ed.

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In *Seers v. Hind* (a) Lord *Thurlow* spoke of a covenant not to alien generally; and it has never been decided that such a covenant does not run with the land. The text books treat the two covenants as having different objects; that of the covenant not to assign generally being to keep the property in a particular person, that of the covenant not to assign without licence being only to secure a responsible tenant. The ratio decidendi in *Williams v. Earle* (b) is in favour of the plaintiff.

Secondly. The legal estate remained in the original lessees, and they must be considered as being in possession of the lease. The fact of finding a stranger in possession of the demised premises entitles the lessor to proceed against the lessee for breach of the covenant not to assign. The assignment in the present case was not, as in *Doe v. Payne* (c), by a stranger to the lessees, but by their nominees, and therefore the legal predecessors are answerable. [*Blackburn J.* When, *Wade* having had possession, *Chirgwin* and *Hamilton* are afterwards found in possession, the inference is that they were put into possession by *Wade*, not by the original lessees.]

Thirdly. The letter of the plaintiff to *Tanner* and *Pridham* authorised a legal transfer only, which would give the same remedy against the assignee as against the original lessee; and, the assignment by them to *Wade* not being such, the plaintiff might have brought ejectment. [*Blackburn J.* But he would have been instantly stopped by injunction.]

Cur. adv. vult.

BLACKBURN J. now delivered the judgment of the Court. [After stating the facts as ante, pp. 755-6.]

(a) 1 *Ves.* 294.

(b) See the preceding case.

(c) 1 *Stark.* 86.

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There was much argument at the bar as to whether, upon the true construction of the covenant as expressed in the lease, it bound the lessees themselves only not to assign, and was merely a personal restriction not affecting their assigns ; or whether it was a covenant running with the land and binding every assign. In the view we take of the matter, it is not necessary to express any opinion on this point, as we think that there never was any assignee of the term who became subject to any of the covenants in the lease, and therefore, if there was a forfeiture of the term, it could only be in consequence of a breach of covenant by the original lessees, *Tanner* and *Pridham*.

It was also argued that the parting with the possession by *Chirgwin* and *Hamilton*, the trustees for *Wade's* creditors, to the defendant, was a breach of covenant on the part of *Tanner* and *Pridham*, the original lessees, because it was said that the law takes no notice of the relation of trustee and cestui que trust ; and therefore it was argued that the possession of *Chirgwin* and *Hamilton*, the cestuis que trust, must be considered at law as the possession of *Tanner* and *Pridham*, and the change of the cestuis que trust from *Chirgwin* and *Hamilton* to the defendant must be considered as a parting with the possession by the lessees *Tanner* and *Pridham*, and consequently a breach of covenant on their part for which they would be liable in damages, though they neither were parties to the change nor had power to prevent it. But no authority was cited in support of this very artificial reasoning ; and we think it obvious that it involves in itself the fallacy of requiring the Court to hold (contrary to the fact) that *Chirgwin* and *Hamilton* (the assigning cestuis que trust) were merely

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servants to *Tanner* and *Pridham*, and yet to take notice that the defendant, to whom they transferred their equitable interest, was more than a servant to *Tanner* and *Pridham*.

The second ground of forfeiture depends upon the effect of the written licence of the 26th *March*, 1865. We do not doubt that the plaintiff might have granted a licence to assign the term so expressed as to forbid the lessees parting with the possession until a complete transfer of the legal interest had been executed. But the practice of letting a purchaser into possession before the legal estate is transferred is so common that if it was intended to forbid such a change of possession it ought to have been clearly expressed, and in the present case it was not. The utmost effect which can be given to the expressions in the letter is, that the landlord had a right to call upon the parties to complete the transfer of the legal estate, which he never did.

The rule, therefore, must be discharged.

Rule discharged.

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Friday,
July 3rd.

ALDOUS *against* CORNWALL

[Reported ante, p. 607.]

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JOHN JONES, WILLIAM SPOONER and Sir
MAXWELL GRAVES *against* PHIPPS.

Friday,
July 3rd.

Notice to quit:
by agent:
by equitable
owner.

1. A notice to quit must be such as the tenant may act upon with safety, that is, one which is in fact, and which the tenant has reason to believe to be, binding on the landlord.

2. A notice to quit given by a general agent in his own name is valid: qualifying the dictum in *Doe d. Lyster v. Goldwin*, 2 Q. B. 143. 146. *Aliter*, if given by an agent holding a special or limited authority.

3. In *October*, 1863, the trustees of *G.*'s marriage settlement purchased a farm, *G.* furnishing a portion of the purchase money. From the time of the purchase *G.* assumed the entire controul over the farm, and had for twenty-six years been allowed by the trustees to have the entire management of all the other settled estates. At the time of the purchase the defendant was yearly tenant of the farm to the vendor. *G.* negotiated with him as to the terms and continuance of the holding, and he treated with and considered *G.* as the legal owner. The Court, having power to draw inferences of fact, held that *G.* had authority from the trustees to give the defendant notice to quit, and that a notice given in his own name, not purporting to be given as agent of the trustees, was valid.

EJECTMENT to recover possession of *Upper Clopton Farm*, in the parishes of *Mickleton* and *Minton*, in the county of *Gloucester*. The writ was dated the 11th *March*, 1865.

On the trial, before *Channell B.*, during the Summer Assizes at *Gloucester*, in 1865, a verdict was found for the plaintiffs, subject to the following case.

The plaintiffs *Jones* and *Spooner* purchased the *Upper Clopton Farm* from the Rev. *R. Biscoe* and the Misses *Biscoe* by a conveyance, dated the 24th *October*, 1863, in which the purchase money was expressed to be paid by them, and the habendum was to them, their heirs and assigns, freed and discharged from a certain mortgage in the indenture mentioned. This conveyance made no reference to the plaintiff Sir *M. Graves*, or to

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his marriage settlement after mentioned, or to the trusts thereof. Sir *M. Graves* supplied from his own funds 2000*l.* of the purchase money of this estate.

By the marriage settlement of Sir *M. Graves*, dated in 1838, estates called the *Mickleton Estates* were conveyed to trustees for him and his intended wife and the issue of the marriage. One of the trusts was to permit Sir *M. Graves* to receive the rents and profits of the settled estates. The plaintiffs *Jones* and *Spooner* were not the trustees named in the settlement, nor was the appointment of either as trustee produced, but they had acted as trustees under it.

The admissibility of the marriage settlement in evidence was objected to on the ground that it did not refer to the premises in dispute, and that the conveyance under which the plaintiffs *Jones* and *Spooner* shewed title made no reference to it or to the trusts thereof. It was received, subject to that objection.

At the time of the purchase of the *Upper Clopton Farm* the defendant was yearly tenant of it under an agreement between himself and the Rev. *R. Biscoe*, but none of the plaintiffs was aware of the terms of the agreement otherwise than that it was for a *Candlemas* taking.

From the time of the purchase the plaintiffs *Jones* and *Spooner* left to Sir *M. Graves* the entire management and controul of the farm, he residing at *Mickleton* and the plaintiffs residing at a distance from it. He had had, with their consent, the entire management of all the estates included in his settlement for a period of twenty-six years.

After the purchase of the *Upper Clopton Farm* negotiations took place between the defendant and Sir *M.*

Graves with reference to the defendant continuing tenant and also with reference to repairs. During these negotiations the defendant was not aware who had purchased the farm from his late landlord, and negotiated with Sir *M. Graves* because he informed the defendant that he had bought it and treated it as his own. Under the belief thus induced that Sir *M. Graves* was the true owner and landlord, and confirmed in this belief by a letter from his solicitor, demanding the rent as due to him, without mention of the plaintiffs *Jones* and *Spooner*, the defendant expressed his willingness to hold the farm under Sir *M. Graves*. Sir *M. Graves* prepared and submitted to the defendant certain conditions in writing upon which he would be allowed to continue tenant, describing himself therein as the landlord. The defendant refused to hold the farm upon those conditions, and Sir *M. Graves*, on the 27th *January*, 1864, gave to him the following notice to quit: "I hereby give you notice to quit and deliver up to me or my assigns on *Candlemas Day*, 1865, the peaceful and quiet possession of the messuage, farm, lands and premises, with the appurtenances, known as *Upper Clopton Farm*, situate, &c., which you lately held of the Rev. *Robert Biscoe*, &c., and now hold of me as tenant, &c. Dated this 27th *January*, 1864.

" *J. Maxwell Steele Graves*."

Sir *M. Graves* in giving this notice acted under the general authority he supposed himself to have. He did not inform the plaintiffs, *Jones* and *Spooner*, that he was about to give, or had given, the notice to quit until after this action was brought, nor did he ask their assent or advice as to the notice or the bringing of this

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1868. action. They knew nothing of the notice or the action
--- JONES till after the 11th of *March*, 1865.

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In *March*, 1864, the defendant received a receipt for "half a year's rent due to *Candlemas* last to Mr. *Biscoe* and Messrs. *Spooner & Jones*, trustees of Sir *J. M.* and *Lady Steele Graves*." Signed "*Kendall & Son*." The form of this receipt was determined by the circumstances that the completion of the purchase took place in the middle of a half year, and therefore a proportion of the rent was due to the old landlord Mr. *Biscoe*. A second receipt was given to the defendant in *August*, 1864, for "half a year's rent due the 2nd instant for farm at *Clopton*." Signed "*Kendall & Son*, agents for Messrs. *Spooner* and *Jones*, the trustees of Sir *M.* and *Lady Steele Graves*." Messrs. *Kendall & Son* were solicitors to Sir *M. Graves*, and had also authority on behalf of Messrs. *Jones* and *Spooner* to receive these rents from the defendant, and give receipts in their names.

In *February*, 1865, the defendant was requested to give up possession of the *Upper Clopton Farm*, and he then questioned the validity of the notice to quit, and refused to give up possession.

It was agreed that the Court should have power to draw such inferences of fact as a jury might have drawn.

The questions for the opinion of the Court were, whether the notice to quit was sufficient to determine the tenancy of the defendant, and whether the plaintiffs or any of them were at the time this action was brought entitled to recover.

The case was argued, in *Easter Term*, *April 2*, before MELLOR, LUSH, and HANNEN JJ. .

Powell (*Macnamara* with him), for the plaintiffs, cited *Wilkinson v. Colley* (a), *Doe d. Marsack v. Read* (b).

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Lanyon (*Huddleston* with him), for the defendant, cited *Doe d. Lyster v. Goldwin* (c) per Lord *Denman*, *Cole on Ejectment*, 44; *Woodfall Landl. and Ten.*, 308, 9th ed.; *Story Law of Agency*, sect. 246, p. 290, notes 2 and 3, 7th ed.

Cur. adv. vult.

LUSH J. now delivered the judgment of the Court.—The decision in this case must depend on the answers to be given to two questions, one of fact, the other of law. The question of fact is, whether Sir *Maxwell Graves* had authority from the trustees, in whom the legal estate was vested, to give notice to quit for determining the defendant's tenancy. The question of law is, whether, assuming that he had such authority, a notice to quit given in his own name, not purporting to be given as agent for the trustees, is valid.

On the first point we are of opinion that the facts stated lead to the conclusion that Sir *Maxwell Graves* had the authority of the trustees to give notice to quit. He had assumed the entire controul over the farm from the time it was purchased in 1863, and had for a period of twenty-six years been allowed by the trustees to have the entire management of all the other settled estates. We therefore infer that it was with the sanction of the trustees that he, who had himself furnished a portion of

(a) 5 *Burr.* 2694.

(b) 12 *East* 57.

(c) 2 *Q. B.* 143. 146.

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the purchase money of this farm, dealt with it as his own, and negotiated with the defendant as to the terms and continuance of the holding. It was incidental to the exercise of these powers that he might determine the tenancy by a notice to quit at such time as he should think proper. As regards the defendant, he could have been under no doubt whether the notice was binding, inasmuch as he was not aware that the estate was vested in trustees, but always treated with and considered Sir *Maxwell* as the legal, as he was in fact the equitable, owner of the farm.

On the second point, we are of opinion that it is not essential to the validity of a notice to quit by such an agent that his agency should appear on the face of the document itself. The distinction is between a general agent and one having a special or limited authority; hence it was held, in *Wilkinson v. Colley* (a) and *Doe d. Marsack v. Read* (b), that a notice given in his own name by a receiver appointed by the Court of Chancery was a valid notice to quit. On the other hand, *Doe d. Lyster v. Goldwin* (c) was cited, where Lord *Denman*, in delivering the judgment of the Court, laid it down (p. 146) that a mortgagor, who had mortgaged subsequently to the demise to the defendant, could not give a notice to quit in his own name. The case, however, did not call for a decision upon that point, as the Court held upon the construction of the mortgage that there was a redemise to the mortgagor until default, and it appeared that no default had been made. This dictum has been adopted in the text books as an authority for the proposition that a notice by an agent

(a) 5 *Burr.* 2694.(b) 12 *East* 57.(c) 2 *Q. B.* 143.

is bad if it does not state that it is given by authority or in the name of the principal—a proposition we think too general, and which requires the qualification we have adverted to (a).

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It is clear that the notice must be such as the tenant may act upon with safety ; that is, one which is in fact, and which the tenant has reason to believe to be, binding on the landlord. The notice in this case does fulfil these conditions. We therefore give our judgment for the plaintiff.

Judgment for the plaintiff.

(a) See also a comment upon *Doe d. Lyster v. Goldwin* in *Doe d. Parley v. Day*, 2 Q. B. 147. 155.

The NORTH EASTERN Railway Company, appellants, The Mayor, Aldermen, and Burgesses of TYNEMOUTH, being the Local Board of Health for that Borough, respondents.

Friday,
July 3rd.

[Reported ante, p. 616.]

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[Monday,
December 13th,
1869.]

*Officer in the
army.
Report on
competence
of inferior
officer.
Action for
libel.
Articles of
war.
Plea of privi-
lege.
Replication:
malice, and
absence of
reasonable or
probable cause,
and of bona
fides.*

DAWKINS *against* Lord FREDERICK PAULET.

1. An action for libel does not lie against an officer in the army for official reports made by him in the discharge and under the obligation of military duties touching the military competence and qualifications of an officer under his command, though alleged to have been made maliciously and without reasonable or probable cause. Per *Mellor, Lush and Hayes JJ., Cockburn C. J. dissente.*

2. The only remedy for a wrong done by a commanding officer to an inferior in the discharge of military duty is the redress provided by the articles of war. Per *Mellor, Lush and Hayes JJ., Cockburn C. J. dissente.*

3. Action for libel brought by the plaintiff, who was a lieutenant colonel in the army, holding a commission as captain in Her Majesty's regiment of Coldstream Guards. Plea. That the defendant was an officer in Her Majesty's army, holding the office of major general commanding the brigade of Foot Guards, of which the regiment of Coldstream Guards formed part, and was the superior military officer of the plaintiff, who was under his command; and that it was the defendant's duty, as such superior military officer, to forward to the adjutant general of Her Majesty's army at head quarters certain letters written and sent to the defendant as such superior officer in relation to their military conduct, duties, and qualifications by the officers under his command, and to make, in relation thereto, for the information of the commander in chief of the army, reports in writing to the adjutant general on the subjects of such letters. The plea then stated the receipt by the defendant from the plaintiff of certain letters in relation to the plaintiff's military duties, and to certain orders received by him as such officer, and to his conduct and competence and fitness for his duties as such officer, in which letters the plaintiff requested that they might, in performance of the defendant's duty as such superior officer, be forwarded by the defendant to the adjutant general for the information of the commander in chief; and that thereupon the defendant, in the ordinary course of his military duties as such superior officer, and because it was necessary and incumbent upon him by his duty to Her Majesty as such superior officer so to do, and as an act of military duty, and not otherwise or for any other reason, forwarded the letters to the adjutant general, and for the information of the commander in chief when forwarding those letters made certain reports in writing in relation to them and their contents, and to certain military orders therein referred to, and with respect to the plaintiff's conduct as such officer in relation to those orders, and to the plaintiff's incompetence in the field, and his unfitness to conduct the business of a battalion in barracks, in the form of letters addressed to the adjutant general, being the proper officer to receive those letters and reports, and the occasion being the proper one according to the discipline and regulations in force in Her Majesty's army for the defendant to make those reports in writing. Replication. That the words were written and published of actual malice on the defendant's part, and without any reasonable, probable, or justifiable cause, and not bona fide or in the bona fide discharge of his duty as superior officer. Demurrer.

(1.) Held, per *Cockburn C. J.*, that the replication meant that the defendant's representations as to the plaintiff, though made on an occasion of military duty, were made dishonestly, maliciously.

and without a belief in their truth, and therefore was an answer to the plea.

(2.) Per *Mellor J.* Held, that the replication was no answer to the plea without an allegation that the statements contained in the letters written by the defendant were false to the defendant's knowledge. And Query, whether the replication with that allegation would have been good?

(3.) Per *Lush J.* Query, as to the meaning of the allegation in the replication that the letters were not written *bonâ fide* or in the *bonâ fide* discharge of the defendant's duty as superior officer? But Held, that, even if it was equivalent to an allegation that the defendant knew the statements in the letters to be false, the action was not maintainable.

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THE first count of the declaration stated that the plaintiff was an officer and a lieutenant colonel in the army, and held Her Majesty's commission as captain in Her Majesty's regiment of Coldstream Guards, and was entitled to certain emoluments in respect thereof: and the defendant falsely and maliciously wrote and published of and concerning the plaintiff and of and concerning him as such officer and captain, in the form of a letter, the words following: "Sir, I (meaning the defendant) have the honour to forward a letter from Lieutenant Colonel *Dawkins*, Coldstream Guards (meaning the plaintiff), complaining of an order which I considered it necessary to give in consequence of his (meaning the plaintiff's) incompetence in the field, and of his unfitness to conduct the business of a battalion in barracks, and to request that his conduct may be referred for investigation by a Court of inquiry. I am fully prepared to support my judgment with regard to Lieutenant Colonel *Dawkins* by the evidence of general officers and others under whom he has served, and with whom he has been brought in contact, since he has risen to the rank of a superior officer. I have taken the present course advisedly, in order to bring this case to a decision, as in justice to the battalion to which he belongs I submit that an officer who has shewn such

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want of judgment, tact, and temper, is not fit to be entrusted with the responsibility and charge of a command." Whereby the plaintiff lost the value of his commission, and was compelled to leave his regiment, and was deprived of the emoluments he might and otherwise would have acquired from the holding of his commission and continuing in his regiment, and was injured in his reputation as an officer and a soldier, &c.

Second count. That the defendant falsely and maliciously wrote and published of and concerning the plaintiff, and of and concerning him in his profession as such officer, in the form of a letter, amongst other things, the words following: "If he (meaning the plaintiff) feels himself aggrieved, he has only himself to thank for the position in which he has placed himself, as I (meaning the defendant) could not in justice to myself retract an order I had given him previously, and which he should have the good sense to understand was not to be cancelled by his (meaning the plaintiff's) surreptitiously assuming a command I considered him unfitted for." Whereby the plaintiff was injured in his reputation as an officer and a soldier, &c.

Plea. That the defendant was an officer in Her Majesty's army on full pay, holding the public office or appointment of major general commanding the brigade of Foot Guards, of which brigade the regiment of Coldstream Guards formed part, and as such officer and major general he was the superior military officer of the plaintiff, and the plaintiff was under his command; and it was the defendant's duty as such superior military officer and major general commanding as aforesaid to forward to the adjutant general of Her Majesty's army at head quarters certain letters from time to time

written and sent to the defendant, as such superior officer and major general commanding as aforesaid, in relation to their military conduct, duties, and qualifications by the officers under his command, and to make thereupon and in relation thereto, for the information of the commander in chief of the said army, reports in writing to the adjutant general of the army on the subjects of those letters, and as to the orders, if any, therein referred to, and the military conduct, the qualifications, competence, and fitness for their military duties of the officers writing the same; and also generally from time to time to make reports in writing to the adjutant general for the information of the commander in chief of the army of and concerning the battalions and regiments comprising the brigade, and of and concerning the officers thereof under the defendant's command, and of and concerning their conduct, qualifications, competence and fitness for their duties as officers. And the defendant, as such superior military officer and major general commanding as aforesaid, had received from the plaintiff certain letters in relation to the military duties of the plaintiff, and to certain orders received by the plaintiff as such officer, and to his conduct, and his competence and fitness for his duties as such officer, in which letters the plaintiff requested that the same might, to wit, in the performance of his military duties as such superior officer and major general commanding as aforesaid, be forwarded by the defendant to the adjutant general of the army, for the information of the commander in chief of the army; and thereupon the defendant in his capacity of major general commanding as aforesaid, and in the ordinary course of his military duty as such superior military officer and major general commanding as

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aforesaid, and because it became, and was, necessary and incumbent upon him by his duty to Her Majesty as such superior military officer and major general commanding as aforesaid so to do, and as an act of military duty, and not otherwise or for any other reason, forwarded the letters to the adjutant general of the army, and for the information of the commander in chief of the army when forwarding such letters made certain reports in writing in relation to the letters of the plaintiff and the contents and subject matter thereof respectively, and to certain military orders received by the plaintiff therein respectively referred to, and with respect to the plaintiff's conduct as such officer in relation to the orders and other matters in the letters of the defendant mentioned, and as to the plaintiff's incompetence in the field, and his unfitness as officer to conduct the business of a battalion in barracks, to wit, in the form of letters addressed by the defendant to the adjutant general of Her Majesty's forces at head quarters (being the proper officer in that behalf to receive the letters and the reports so forwarded and addressed respectively); and such occasion being the proper occasion, according to the discipline and regulations in force in Her Majesty's army, for the defendant, as such superior military officer and major general commanding as aforesaid, to make to the adjutant general such reports in writing, which are the letters of the defendant and the writing and publishing complained of in the first and second counts of the declaration respectively.

Replication. That the words in the declaration mentioned were written and published by the defendant of actual malice on his part, and without any reasonable, probable, or justifiable cause, and not bonâ fide or in

the bonâ fide discharge of his duty as such superior officer.

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Demurrer, and joinder.

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The case was argued, in *Trinity* Term, *June* 1, before COCKBURN C. J., MELLOR, LUSH and HAYES JJ.

Sir *R. P. Collier*, Attorney General, (Sir *J. D. Coleridge*, Solicitor General, *Dowdeswell* and *Archibald* with him,) for the defendant.—There are two classes of privileged communications. First, those absolutely privileged; where no action is maintainable in respect of the words written or spoken, even though they were written or spoken maliciously and without reasonable or probable cause. Secondly, those *primâ facie* privileged, which cease to be so when express malice is proved. The representations made by an officer in the army in the course of military duty to his commanding officer, relating to the military capacity and qualifications of an inferior officer, are within the first class.

It is established that an action cannot be maintained against a Judge for any words spoken or otherwise published in his judicial capacity in a Court of justice; *Scott v. Stansfeld* (a), where *Kelly* C. B. said, *L. R.*, 3 *Exch.* 223, "It is essential in all Courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges should be at liberty to exercise their

(a) 37 *L. J. Exch.* 155; *S. C. nom. Scott v. Stansfield*, *L. R.* 3 *Exch.* 220.

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functions with independence and without fear of consequences." And *Martin B.*, p. 224, "If words spoken under such circumstances were the subject of an action of slander, the most mischievous consequences would ensue; no Judge, as my Lord has pointed out, would then be able freely to administer justice, for if it were alleged, as is the case here, that he spoke falsely and maliciously, and not bonâ fide in the discharge of his duty, and that what he said was irrelevant to the matter in hand, a jury would have to determine the question whether what he said in the course of a case which he had jurisdiction to try was or was not said under the circumstances so alleged. What Judge could try a case with any degree of independence if he was to be afterwards subject to have his conduct in the administration of justice commented upon to a jury, and the propriety of it determined by them? It appears to me that the opinion expressed by Chief Justice *Kent*, in the *American* case cited, puts this matter upon its proper foundation, and states that which is both sound law and good sense in reference to it." The *American* case is *Yates v. Lansing* (a), where *Kent C. J.* said, p. 291, that "the doctrine which holds a Judge exempt from a civil suit or indictment, for any act done; or omitted to be done by him, sitting as a Judge, has a deep root in the common law;" and that it is "a principle on which rests the independence of the administration of justice." And pp. 294-5 he referred to *Groenvelt v. Burwell* (b), in which *Holt C. J.* "went at large into the cases in

(a) 5 *Johns. U. S.* 282; affirmed in the Court of errors, 9 *Johns.* 395.

(b) 1 *Ld. Raym.* 454; 1 *Salk.* 396; *S. C. Grenville v. The College of Physicians*, 12 *Mod.* 386. See also *Kemp v. Neville*, 10 *C. B. N. S.* 523. 549-551.

support of the doctrine, and shewed" "that Judges were not liable to an action by the party, for what they did as Judges;" and "that no averment was admissible that a Judge of record had acted against his duty." [*Mellor J. cited Fray v. Blackburn (a)* per *Crompton J.*] This privilege is not confined to Judges of Courts of record, for in *Jekyll v. Sir John Moore (b)* it was held that an action was not maintainable against the president of a court martial for a libel contained in the sentence of the Court delivered by him. Jurors, when making a presentment or delivering a verdict, are within this class; 1 *Hawk. P. C.*, by *Curwood*, b. 1, c. 27, s. 5, p. 447; 5 *Bac. Abr. Libel (A)* 4, p. 202, 7th ed. The allegations and statements made by parties to a suit, in any proceeding according to the regular course of justice, are absolutely privileged; 1 *Roll. Abr.* 87, pl. 4, cited by *Holroyd J.* in *Hodgson v. Scarlett (c)*, and in note (b) *ibid.* p. 245, also in note (1) to *Lake v. King (d)*. So also are the statements by a witness in the course of a judicial proceeding, though alleged to have been made falsely and maliciously and without any reasonable or probable cause; *Revis v. Smith (e)*. And it is laid down in 1 *Hawk. P. C.* by *Curwood*, b. 1, c. 28, s. 8, p. 544, "It hath been resolved, that no false or scandalous matter contained in a petition to a committee of parliament, or in articles of the peace exhibited to justices of peace, or in any other proceeding in a regular course of justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to public prosecutions,

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in respect of their applications to a Court of justice. And the chief intention of the law in prohibiting persons to revenge themselves by libels, or any other private manner, is to restrain them from endeavouring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those whom the law has appointed to determine them." This privilege also extends to words spoken by counsel in a cause if relevant to the matter in issue; *Hodgson v. Scarlett* (a) and note (b) *ibid.* p. 245 (b). [*Cockburn* C. J. It is said in the note that counsel are not ousted of their exemption from an action for defamation, though the words spoken were false and malicious; but that position received some qualification in the case of *Serjt. Dowling* (c).] [He also cited *Irwin v. Sir George Grey* (d), which was an action against the Secretary of State for not submitting to Her Majesty a petition of right presented by the plaintiff under stat. 23 & 24 *Vict. c.* 34.]

The principal authority on this point is *Sutton v. Johnstone* (e). That was an action against the defendant for maliciously and without probable cause bringing the plaintiff to a court martial; and, the Court of Exchequer having held that the action was maintainable for the reasons given in a judgment delivered by *Eyre* B., that judgment was reversed in the Exchequer Chamber (f), and the judgment of the latter Court was affirmed in the House of Lords (g). In the celebrated judgment of

(a) 1 B. & A. 232.

(b) This note was furnished to the reporters by *Holroyd* J. See per *Alderson* B. in *Gibbs v. Pike*, 9 M. & W. 351. 358.

(c) See *Needham v. Dowling*, 15 L. J. C. P. 9.

(d) 3 F. & F. 635.

(e) 1 T. R. 493.

(f) 1 T. R. 510.

(g) 1 T. R. 784; 1 Bro. Parl. Ca. 76, 2nd ed.

Lord *Mansfield* and Lord *Loughborough*, the considerations which inclined them to lean against allowing the action are thus stated, p. 549, "A commander who arrests, suspends, and puts a man on his trial, without a probable cause, is guilty within that article (*a*); but the same jurisdiction, which tries the original charge, must try the probable cause; which in effect is a new trial. And every reason, which requires the original charge to be tried by a military jurisdiction, equally holds to try the probable cause by that jurisdiction. The salvation of this country depends upon the discipline of the fleet; without discipline they would be a rabble, dangerous only to their friends, and harmless to the enemy. Commanders, in a day of battle, must act upon delicate suspicions; upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience. In case of a general misbehaviour, they may be forced to suspend several officers, and put others in their places. A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience. But what condition will a commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature? If this action is admitted, every acquittal before a court martial will produce one. Not knowing the law, or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them. The relaxation and decay of discipline in the fleet has been severely felt. Upon an unsuccessful battle there are mutual recriminations, mutual charges, and mutual trials. The whole fleet take sides with great animosity—

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(*a*) The 33rd of the Articles for the Government of the Navy, enacted by stat. 22 G. 3. c. 33. s. 2.

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Party prejudices mix—If every trial is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief, will be.” *Home v. Lord F. C. Bentinck, in error* (a), is cited in note (l) to *Lake v. King* (b) as an authority for the position that “no action can be maintained for matter injurious to the plaintiff’s character contained in a report made to the commander in chief, by the president of a number of military officers, acting as a Court of enquiry under his directions.” In that case it was held that the report was privileged, and therefore evidence of it not admissible. The question would have been whether the action was maintainable if the defendant instead of pleading not guilty had pleaded a justification as the defendant in the present case has done. [He also cited *Wyatt v. Gore*, pl. 1 (c).] [Cockburn C. J. In *Home v. Lord F. C. Bentinck, in error* (a), there was no allegation in the declaration that the report was not made bonâ fide, and no question whether the privilege would be taken away by the report being false and malicious.] The report being privileged could not be made the subject of an action. In *Dawkins v. Lord Rokeby* (d), which was an action by the present plaintiff against his commanding officer for false imprisonment, malicious prosecution and conspiracy, Willes J. nonsuited the plaintiff on the ground that no cause of action in a civil Court had been shewn, and expressed his opinion, pp. 832-3, that even if it had been made out that the defendant had maliciously and without reasonable and probable cause given evidence before the Courts of enquiry held upon the plaintiff’s conduct, and that

(a) 2 B. & B. 130.

(b) 1 Wms. Saund. 131 c., 6th ed.

(c) Holt N. P. C. 299.

(d) 4 F. & F. 806.

he was the prime mover in the dismissal of the plaintiff from the army, he could not have obtained redress in the civil Courts;" adding, "I cannot entertain a doubt that this is the law; whatever responsibility may attach to me for pronouncing it, I must pronounce it, as I am satisfied that it exists."

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This immunity of officers in the army, as that of Judges, rests upon grounds of public policy, viz., the maintenance of military discipline, and the necessity of military officers acting independently and without fear of being harassed with actions. Consequently, the motives of an act done in the strict course of military duty and under the obligation of military discipline are not examinable in a Court of law. And no action is maintainable by one officer in the army against another in respect of any loss of military status or position resulting from an act of military duty. The appropriate tribunal for trying a question of military duty is a court martial. If this action is maintainable, the justification pleaded might refer to a jury the question whether the plaintiff was competent to command on the field of battle. [*Lush J.* And I do not see how we could exclude an action for some act done on the field of battle. In *Le Caux v. Eden* (a), which was an action for false imprisonment in consequence of taking a ship as prize, it was held that a Court of law could not enquire whether the ship was lawful prize or not.] An officer entering the army accepts the military status with all its consequences, with reference, among other things, to the remedy afforded for any wrong affecting it; *In Re Mansergh*, pl. 2 (b). These letters only affected the military status of the plaintiff, and for that

(a) 2 Doug. 594.

(b) 1 B. & S. 400.

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wrong the party injured "is not without his remedy," as was said by Lord *Mansfield* and Lord *Loughborough* in *Sutton v. Johnstone*, in error (a). [He referred to the Mutiny Act, and Articles of War, 1868, p. 287 (b).]

It appears from the pleadings that the letters of the defendant were not written *ex proprio motu*, but were a comment on a letter of complaint written by the plaintiff to the adjutant general; and their object was to put in motion a Court of inquiry into the conduct of the plaintiff; they are therefore analogous to a bill presented by the grand jury.

The plea alleges that the letters were written and transmitted by the defendant in the ordinary course of his military duty; and that allegation is not traversed. The replication does not allege that the defendant knew that the words complained of were false.

Hill (*Holl* with him), for the plaintiff.—The privilege of Judges, jurors and witnesses, established by a current of decisions, is admitted: the latter however are exposed to an indictment for perjury. But no case has proceeded so far as to decide that a man, by becoming a soldier, divests himself of his right to redress in the civil Courts for a wrong done to him in a military matter, maliciously and without reasonable and probable cause. In *Sutton v. Johnstone* (c) the Court of Exchequer gave judgment for the plaintiff on the ground of absence of reasonable and probable cause for the course pursued by the defendant, the judgment of the court martial being that the disobedience by the plaintiff of the orders given by the defendant was justifiable. The Court of error reversed the judgment of the Exchequer on the ground

(a) 1 T. R. 510. 550.

(b) See post, p. 808.

(c) 1 T. R. 493.

that as there had been disobedience of orders there was not absence of reasonable and probable cause, pp. 503-4; but the opinion expressed in the judgment delivered by *Eyre B.*, that an action brought by an inferior against a superior officer would lie, was not reversed. [He referred to the conclusion of the reasons given by Lord *Mansfield* and Lord *Loughborough*, p. 550.] Upon that case being cited in *Warden v. Bailey* (a) *Lawrence J.* observed, p. 69, "Lord *Mansfield* held that the action could not be supported, because the declaration shewed probable cause, and though the inclination of his opinion was that no such action could be maintained, yet he said it was not necessary to decide on that point, for the facts did not raise the argument." [He also referred to another observation of *Lawrence J.*, p. 75 (b).] And *Mansfield C. J.*, in giving judgment, said, pp. 88-89, "The learned Judge was desired to nonsuit the plaintiff upon the ground of a doctrine supposed to be established by the case of *Sutton v. Johnstone*, that an inferior officer cannot maintain an action against a superior officer for imprisonment inflicted in consequence of disobedience to any command whatsoever, issued by the superior to the inferior officer. To be sure, that is a very wide inference to draw from *Sutton v. Johnstone*, that being only a case of imprisonment for disobedience to the orders issued in the heat of a battle, where obedience, and instant obedience, is necessary. Lord *Mansfield* and Lord *Loughborough* do not decide this point; they expressly avoid determining it, though they intimate a very strong opinion, and observe that it is a very important case, and send it to the dernier resort. The only

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(a) 4 *Taunt.* 67; *S. C. in error*, 4 *M. & S.* 400, on a bill of exceptions after the second trial before *Mansfield C. J.*

(b) See post, pp. 792-3.

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point therefore decided in *Sutton v. Johnstone* is, that there was probable cause for the imprisonment in that case." *Barwis v. Keppel* (a) was an action against a superior officer for making an order by which the plaintiff was reduced from the station of a serjeant of the Guards to that of a common soldier, which order was made while the army was in expectation of a battle in *Germany*; and judgment was given for the defendant on the ground that the army being out of the King's dominions was subject only to the King's prerogative; it was not suggested that an action by an inferior against his superior officer was not maintainable. [*Cockburn* C. J. That case is rather against you: the Court held that they had no jurisdiction in the case. The order, though not made under the articles of war, was made under the prerogative of the Crown.] The Court also considered that the common law does not interfere with the army *flagrante bello*; but here *cessante bello* it has jurisdiction. In *Le Caux v. Eden* (b) it was held that the action would not lie on the ground that the matter was within the jurisdiction of the Court of Admiralty; and it was taken for granted that the plaintiff might have a remedy there. [*Lush* J. The Court said it was clear that the defendant had no right to seize the ship, but a capture at sea as prize was not a matter of common law jurisdiction: that decision is applicable to military matters.] In *Home v. Lord F. C. Bentinck, in error* (c), the report was delivered by the defendant as president of a Court of inquiry directed to be held by the commander in chief: *Dallas* C. J. said, p. 160, "The proceeding was, therefore, in its very nature an official proceeding, directed by the

(a) 2 *Wils.* 314.(b) 2 *Doug.* 594.(c) 2 *B. & B.* 130.

commander in chief, for the purpose of obtaining that information, which he was bound to obtain as to the conduct of every officer holding a commission in His Majesty's army, and in furtherance of the exercise of his public duty upon the result of such inquiry, whether the inquiry was to cease in the first instance, or whether the result of that inquiry was to lead to some ulterior measure. The consequence of this was, that a Court of inquiry was held, of which the defendant in this case was the presiding officer; that Court of inquiry was held in consequence of a duty created by the order of the commander in chief, which was imperative upon him; and a report made by the defendant, in conjunction and connection with the officers, was an act of duty imposed upon him as a military man, by his superior commander, the commander in chief, whose order he was bound to obey." In the present case the defendant was not ordered to make a report on the conduct of the plaintiff. The position in note (1) to *Lake v. King* (a), founded on *Home v. Lord F. C. Bentinck*, in error (b), does not apply to the case of an inferior officer who has only a general discretion. In *Dickson v. The Earl of Wilton* (c), which was an action against the colonel of a regiment for libel and verbal slander, it being submitted by counsel for the defendant that the letters were privileged absolutely, Lord Campbell, in directing the jury, said, pp. 429-30, "The occasion justified the writing such letters as were fairly necessary to put the superior officer in possession of the defendant's accusations; but as a matter of law, the precise letters were not privileged: and the question

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PAULET.(a) 1 *Wms. Saund.* 131 c., 6th ed. (b) 2 *B. & B.* 130.(c) 1 *F. & F.* 419.

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which you have to decide is, whether, looking at all the circumstances of the case, the defendant, from other motives than a sense of duty, wrote the letters." In *Dickson v. Viscount Combermere and others* (a), which was an action against the colonel of a regiment of militia, the lord lieutenant of a county, who was commandant of the militia of the district, and the secretary for war, for causing the plaintiff to be removed from the office of lieutenant colonel of the regiment, *Cockburn C. J.* left the question of the intention and motives of the defendants to the jury. [*Mellor J.* There the gist of the action was an alleged conspiracy by the defendants, not in the course of military duty, to cause the removal of the plaintiff from his command: the recommendation of the secretary for war to Her Majesty to dismiss him was given in evidence as an overt act.] In *Keighly v. Bell* (b), which was an action by a military officer against his commander for false imprisonment, malicious prosecution and libel, *Willes J.*, p. 785, is reported to have "observed that, assuming the arrest to have been lawful, that is, by lawful military authority, he did not see how the mere manner of it, if according to military usage and authority, could be the subject of enquiry here." As to the count for libel in sending to the law agents of the government of *India* a certificate of the defendant's absence without leave, the learned Judge said, p. 799, that he was clearly of opinion that no action could be maintained against the defendant for sending the certificate; but it was unnecessary to decide the point, because, if it could be maintained, two elements were essential, malice and the absence of probable cause. And after consulting the other Judges of

(a) 3 F. & F. 527. 585. 606.

(b) 4 F. & F. 763.

the Court of Common Pleas, he said, p. 800, that the question upon all the counts was, whether the acts done by the defendant were acts done, not in the ordinary discharge of his military duty, but without any reasonable or probable cause, and merely for the purpose of injuring the plaintiff; and, in his opinion, there was no evidence of the affirmative of that question.

Dawkins v. Lord Rokeby (a) was decided by the same learned Judge on the authority of Lord Mansfield and Lord Loughborough in *Sutton v. Johnstone*, in error (b).

The replication, which alleges that the words complained of were written and published by the defendant of actual malice and without reasonable or probable cause, and not in the bonâ fide discharge of the defendant's duty, is an answer to the plea. [*Cockburn* C. J. It does not necessarily follow that the words were false to the defendant's knowledge. A man might have no reasonable or probable cause for believing what he said, and yet might have an ill founded belief. A thing may be so improbable that a man exercising a reasonable mind and judgment would not believe it, and yet another man might have an honest belief of it. *Lush* J. Does the replication amount to more than this; that the defendant ought not to have believed the words to be true?] The falsity of the words may be implied from the averment that they were written maliciously.

The action is maintainable in order to give the plaintiff compensation in damages, which he could not recover under the 12th Article of War (c). If the principle of absolute immunity is conceded in the present case an attempt will be made to extend it to persons

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(a) 4 F. & F. 806. 832.

(b) 1 T. R. 510.

(c) See post, p. 808.

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employed in the civil service. [*Hayes J.* The Legislature have not created a separate jurisdiction for them.]

Sir *R. P. Collier*, Attorney General, in reply.

Cur. adv. vult.

COCKBURN C. J. This is an action for a libel written by the defendant concerning the plaintiff as an officer holding Her Majesty's commission as captain in the Coldstream Guards, in a letter addressed by the defendant to the adjutant general of the army, reflecting on the character and capacity of the plaintiff as an officer, and in which the plaintiff was represented as incompetent in the field and unfit to conduct the business of a battalion in barracks, and it was requested that his conduct might be referred for investigation by a Court of inquiry, and in which it was finally submitted that an officer who had shewn such want of judgment, tact and temper, was not fit to be entrusted with the responsibility and charge of a command. By reason of which it is alleged that the plaintiff has lost his commission, and has been compelled to leave his regiment, and has suffered in his reputation as an officer.

The declaration also contains a second count, to which however it is not material further to refer.

To this declaration there is a plea of a somewhat prolix and confused character, but the sum and substance of which is that the defendant being the commanding officer of the regiment in which the plaintiff was a captain, and the plaintiff having written a letter to the adjutant general complaining of an order given by the defendant as such commanding officer, and having conformably to military regulation sent such letter to the defendant to be by

him forwarded to the adjutant general, it became the duty of the defendant in transmitting the letter to accompany it with a report on the order complained of and the subject matter of the complaint with such observations as the circumstances of the case appeared to require; that it thus became necessary as a part of the duty of the defendant to report on the incompetency and unfitness of the plaintiff; that the matter complained of in this action was contained in a report thus made in the course of the defendant's duty as such commanding officer, and in fulfilment of such duty and not otherwise, or for any other reason.

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To this plea there is a replication that the words complained of were written and published by the defendant of actual malice and without any reasonable, probable or justifiable cause, and not bona fide or in the bona fide discharge of the defendant's duty as alleged.

To this replication there is a demurrer, and we have to determine whether the replication affords a sufficient answer to the plea.

Independently of the great question of absolute privilege in military matters which presents itself in this case there can, in my opinion, be no question that the replication is sufficient. If the effect of the plea is to be taken to be that the matter complained of was written for the purpose of causing an inquiry to be held as to the conduct and competency of the plaintiff with a view to his removal from the army, it is a sufficient answer in point of law to say that such a proceeding was malicious and without reasonable and probable cause. If, which I think is the right view, the effect of the plea is that the matter complained of was published in the discharge of a duty,

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and as such was privileged, it would under ordinary circumstances be sufficient to reply that the words were published maliciously and without *bona fides*. For to entitle matter otherwise libellous to the protection which attaches to communications made in the fulfilment of a duty *bona fides*, or to use our own equivalent, honesty of purpose is essential. And to this again two things are necessary: First, that the communication be made not merely in the course of duty, that is, on an occasion which would justify the making it, but also from a sense of duty: Secondly, that it be made with a belief of its truth. By the demurrer the defendant, for the present purpose at least, in order to raise this question of law, admits, as he must do, that the averments in the replication are true; in other words that his representations as to the plaintiff, though made on an occasion of military duty, were made dishonestly, maliciously, and without a belief in their truth.

To support this demurrer it is therefore necessary to maintain that in all matters relating to military authority and discipline, a subordinate officer is, so far as civil redress is concerned, entirely at the mercy of his superior; that the latter may institute proceedings against him without right or reason on charges which he knows to be unfounded; may, under the disguise of duty, write concerning him that which he knows to be false, and may thus bring upon him consequences the most disastrous without the party injured being entitled to redress in a Court of law. While I fully agree that acts done in the honest exercise of military authority are entirely privileged, I confess that I am not prepared to arrive at a conclusion so startling and apparently unjust as that if the opportunity afforded is inten-

tionally abused for the purposes of injury and wrong, no redress is to be had by a sufferer in a Court of law.

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The question may be considered with reference, first, to legal authority, secondly, to general principle, and thirdly, to the peculiar position of persons in the army and navy as distinguished from the rest of the Queen's subjects.

The question first came before the Courts in 1785, in the great case of *Sutton v. Johnstone* (a), which was an action against the defendant for having, as commanding officer of a fleet, maliciously and without reasonable and probable cause brought the plaintiff to a court martial for breach of duty and disobedience of orders. Two principal questions arose: First. Whether the action as brought by an inferior against a superior officer would lie. Secondly. Whether the facts upon which the defendant had acted in instituting proceedings against the plaintiff amounted to reasonable and probable cause. A second verdict with large damages having been given for the plaintiff, and a motion in arrest of judgment having been made in the Court of Exchequer in which the action had been brought, *Eyre B.* delivered the judgment of the Court. In the difference of opinion which exists on this very important question I think it desirable to recall to recollection this remarkable and, to my mind, satisfactory judgment. Dealing with the first branch of the case, he says, p. 503, "The Court never had a difficulty upon this part of the case. The principle of the action . . . is general and universal. In the cases alluded to, of Judges and jurors, it cannot apply because the law gives faith and credence to what they do; and therefore there must always, in what they

(a) 4 T. R. 493.

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do, be cause for it ; and there never can be any malice in what they do. The presumption of law, that Judges and jurors do nothing causelessly and maliciously, does not derogate from the universality of the principle, 'that where it can be shewn that one man has causelessly and maliciously accused another of a crime, or has otherwise vexed him by causelessly and maliciously exercising upon him, to his damage, powers incident to his situation of superior, the injured party is entitled to redress by this species of action.' The commander in chief of a squadron of ships of war is in the condition of every other subject of this country, who, being put in authority, has responsibility annexed to his situation. The propositions which attempt to establish a distinction for him, are dangerously loose and indefinite. It is said, subordinate officers may be brought to a court martial for improper conduct, and that no action lies for anything done in a course of discipline, or under powers incident to situation. If by *improper conduct* is meant a breach of the articles for the government of the navy ; if, by a *course of discipline*, is meant, exacting that which the discipline of the navy requires ; if by *what is done under powers*, is meant that which is warranted to be done under those powers ; it will be agreed simply, for doing any of those acts no action will lie ; for those are lawful acts in themselves, and there is nothing to make them unlawful in the particular case. But in respect of the first branch of this proposition, if it is meant that a commander in chief has a privilege to bring a subordinate officer to a court martial for an offence which he *knows* him to be innocent of, under colour of his power, or of the duty of his situation to bring forward inquiries into the conduct of his officers,

the proposition is too monstrous to be debated. Under the second branch of it, it may not be fit, in point of discipline, that a subordinate officer should dispute the commands of his superior, if he were ordered to go to the masthead; but if the superior were to order him thither, knowing that, from some bodily infirmity, it was impossible he should execute the order, and that he must infallibly break his neck in the attempt, and it were so to happen, the discipline of the navy would not protect that superior from being guilty of the crime of murder. And one may observe in general, in respect of what is done under powers incident to situations, that there is a wide difference between indulging to situation a latitude touching the *extent of power*, and touching the *abuse* of it. Cases may be put of situations so critical, that the power ought to be unbounded: but it is impossible to state a case, where it is necessary that it should be abused; and it is the felicity of those who live under a free constitution of government, that it is equally impossible to state a case where it can be abused with impunity. We enter into all the difficulties in the situation of an officer, whose honour and fortune may come to be so staked. In this particular case they have had their weight with us; the decision has not been a hasty one, but considerations of this nature cannot exclude the established jurisdiction of the country: on the contrary, those jurisdictions must be presumed to be equal to their functions; it must be presumed that they will do their duty honestly; if they do, no man can have much to fear. To situations which require indulgence, they will shew it; but be the risk more or less, all men hold their situations in this country upon the terms of submitting to have their conduct examined

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and measured by that standard which the law has established. Men of honour will do their duty and will abide the consequences."

Error having been brought on this judgment, the case was twice argued before Lord *Mansfield* and Lord *Loughborough*, the latter being then Chief Justice of the Court of Common Pleas, and the judgment of the Court of Exchequer was reversed, not however on the ground that the action would not lie, but solely on the ground that the facts sufficiently shewed the existence of reasonable and probable cause. Lord *Mansfield* in a masterly argument, to which I shall again have occasion to refer, gives his reasons for thinking that such an action ought not to be allowed, but he stops short of deciding the point. At the conclusion of his reasoning he says, p. 550, "These considerations incline us to lean against introducing this action. But there is no authority of any kind either way; and there is no principle to be drawn from the analogy of other cases, which is applicable to trials by a sea court martial under the marine law, confirmed, directed, and authorized by statute. And therefore it must be owned the question is doubtful: and when judgment shall depend upon a decision of this question, it is fit to be settled by the highest authority. According to our opinion it is not necessary to the judgment in this cause. Because, supposing the action to lie, we think judgment ought to be given for the defendant." The judgment of the two chief justices was subsequently affirmed in the House of Lords; but, as it appears, on the same ground, namely, the existence of reasonable and probable cause. In the later case of *Warden v. Bailey* (a), *Lawrence J.*, in the course of the

(a) 4 *Taunt.* 67.

argument, stated that he had "heard from good private information that the reasons assigned by Lord *Mansfield* were not adopted by the House of Lords, though the judgment of the Chief Justices was affirmed."

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The same question presented itself in the case just referred to of *Warden v. Bailey* (a). There the plaintiff, a serjeant in a regiment of militia, having been arrested by the defendant, the adjutant of the regiment, by order of the lieutenant colonel, for disobedience of an order of the latter with reference to attendance at an evening school and contribution to its support, and for inciting others of the regiment to disobey the order, and having brought an action for such arrest and imprisonment, the learned Judge who presided at the trial, on the authority of the case of *Sutton v. Johnstone, in error* (b), nonsuited the plaintiff. On the motion to set the nonsuit aside it was again strenuously urged, as before in *Sutton v. Johnstone*, that the action would not lie. The Court, however, considering *Sutton v. Johnstone, in error*, as falling altogether short of deciding so large a proposition, set the nonsuit aside on the ground that, while there was no evidence of the mutinous language attributed to the plaintiff, the order of the colonel to attend the school and contribute to the expenses of it was beyond the scope of his military authority, and that consequently the disobedience of the order did not justify the arrest.

On a second trial, before Sir *James Mansfield* C. J., the learned Judge having ruled according to the foregoing decision, a bill of exceptions was tendered, and the case came on before the Court of King's Bench, sitting as a Court of error. The same points appear to have been made as had been urged in the Court below,

(a) 4 *Taunt.* 67.(b) 1 *T. R.* 510.

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and in the end the Court gave judgment for the defendant in the action, not however on the ground that the action would not lie, but that there was sufficient evidence of mutinous language having been used by the plaintiff to justify the arrest. It can hardly be supposed that had the Court been prepared to adopt the reasoning of Lord *Mansfield* in *Sutton v. Johnstone*, *in error* (a), they would not have disposed of the case on the question of law instead of going into an elaborate investigation of the evidence.

The question again presented itself in an action brought by the present plaintiff, *Dawkins v. Lord Rokeby* (b), an action arising out of these same transactions and regimental disputes. The action was for false imprisonment, malicious prosecution, and conspiracy to cause the plaintiff's removal from the army. The cause came on for trial before Mr. Justice *Willes* at Nisi prius, when the learned Judge is reported to have ruled, partly on similar grounds to those set forth by Lord *Mansfield* in *Sutton v. Johnstone*, *in error*, and partly because it had been so decided in that case, that even were it proved that the proceedings ascribed to the defendant had been malicious and without reasonable and probable cause, and that he had been the prime mover in the dismissal of Colonel *Dawkins* from the army, the latter could not obtain redress from a Court of law, and he accordingly nonsuited the plaintiff.

These are the authorities directly bearing on the question, and the result of them appears to me to be that so much of the decision of the Court of Exchequer in *Sutton v. Johnstone* (c), as is immediately in point to the present case, stands unreversed either by the judg-

(a) 1 T. R. 510.

(b) 4 F. & F. 806.

(c) 1 T. R. 493.

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ment in error in that case or by any subsequent decision of a Court in banc, while it is supported by the decision of the Court of Common Pleas in *Warden v. Bailey* (a), and incidentally and indirectly so by the decision of the Court of King's Bench, when that case was before them in error. The case of *Dawkins v. Lord Rokeby* (b) is no doubt to the contrary. But, however great my respect for the opinion of the learned Judge who presided, I cannot hold myself bound by a single ruling at Nisi prius, however positively expressed, in a matter as to which the Court of Exchequer in *Sutton v. Johnstone* expressly, and the Court of Common Pleas in *Warden v. Bailey* (a), as it appears incidentally, entertained a different opinion, and which Lord *Mansfield* himself declared to be open to grave doubt, and fit to be decided by the highest authority.

But it is argued that, independently of authority, as a matter of public policy an action of this nature ought not to be allowed, and that, as in the case of Judges, jurors and witnesses, acting in the administration of justice, an absolute immunity is afforded, however unrighteous may have been their acts, however malicious and sinister their motives, so, by analogy, on like grounds of public policy, superior officers in military or naval command, ought to enjoy entire immunity in respect of acts, however unjust and malicious, done by them in the exercise of their authority.

The argument cannot be put more forcibly than it is presented in the reasoning of Lord *Mansfield* in *Sutton v. Johnstone*, in error (c). In substance it comes to this. It is essential to the efficiency of an army that discipline

(a) 4 Taunt. 67.

(b) 4 F. & F. 806.

(c) 1 T. R. 549—550.

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should be upheld, that obedience to orders, however desperate and peremptory, should be enforced ; that the energy of commanding officers in giving such orders in cases of trying emergency, and enforcing obedience of orders and observance of discipline by bringing those guilty of disobedience of orders or of breach of discipline to punishment according to military law, should not be crippled by the apprehension of vexatious actions, more especially as juries, by whom such actions would have to be decided, are incompetent to form a judgment on matters of a military or naval character, and might adopt conclusions different from those at which a professional tribunal, alone fitted to decide on such a matter, might arrive; and if any of those who have voluntarily submitted themselves to military law should suffer injustice or oppression at the hands of a superior, they must be content with such redress as the military law affords.

Yielding to no one in respect for an opinion of Lord *Mansfield*, I must say that this reasoning fails to bring conviction to my mind. I cannot bring myself to believe that officers in command would hesitate to give orders which a sense of duty required, or to enforce obedience and discipline in the due exercise of authority from any idle apprehension of being harassed by vexatious actions. Men worthy to command would do their duty, as *Eyre B.* expressed it, "fearless of consequences," and would trust to the firmness of Judges and the honesty and good sense of juries to protect them in respect of acts honestly, though possibly erroneously, done under a sense of duty.

On the other hand, while no man would more strenuously uphold military authority when legitimately

exercised, or would more earnestly urge upon juries the propriety of presuming every thing in favour of its legitimate exercise, and of requiring the most cogent and conclusive evidence of its abuse to entitle an inferior officer to recover in an action against his superior, I cannot bring myself to think that it is essential to the well being of our military or naval force that where authority is intentionally abused for the purpose of injustice or oppression, where charges are preferred which, to the knowledge of the party preferring them, are unfounded and unjust, where representations are made which the party making them knows to be slanderous and false, the party injured, whose professional prospects may have been ruined, and whose professional reputation may have been blasted, is to be told that the Queen's Courts, in a country whose boast it is that there is no wrong without redress, are shut to his just complaint. On the contrary, I cannot but believe that to a force depending on voluntary augmentation it will be far more beneficial that its subordinate members should know that against intentional oppression and manifest wrong, leading to consequences disastrous to professional interests or character, redress may be found at the civil tribunals of the country.

Neither can I believe that a jury, under the guidance of a Judge, may not be safely entrusted with the decision of such questions. No doubt in matters of military discipline and government a military tribunal is better qualified to form a correct judgment, and where the question turned on nice points of military or naval tactics a jury would be advised, and doubtless would act on such advice, to presume in favour of military or naval authority. But in cases of manifest wrong and

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suaded that the number of such actions would be infinitely small and would be easily disposed of: while on the other hand I can easily conceive cases in which judicial opportunity might be so perverted and abused for the purpose of injustice, as that on sound principles the authors of such wrong ought to be responsible to the parties wronged: at all events, it seems to me by no means to follow that, because such a principle may be required in the interest of the administration of justice, it is to be applied without positive enactment to wrongs inflicted by one member of the land or naval forces of the Crown upon another.

Thinking the question of policy more than doubtful for the reasons I have given—though after the reasoning of Lord *Mansfield*, the ruling of Mr. Justice *Willes*, and the opinion of my learned brothers, from whom I have the misfortune to differ, I of course feel the utmost diffidence in my own views—also looking upon it as exceedingly doubtful whether, assuming that as a matter of public policy an action by an inferior against a superior officer ought not to be allowed, a Court of law, in the absence of positive enactment, can act upon such an assumption, I cannot but think that if the law is to be thus settled it should be done by legislative enactment, or, at all events, by a Court of error, and that acting as a Court of the first instance in dealing with this demurrer we should give judgment for the plaintiff; but my learned brothers, for reasons they will themselves give, have arrived at a different conclusion, and therefore judgment must be given for the defendant.

MELLOR J. This case was argued before my Lord

Chief Justice, my brother *Lush*, the late Mr. Justice *Hayes* and myself, in *Trinity* Term last, and the judgment which I am about to deliver was entirely approved by my lamented friend Mr. Justice *Hayes*. I approach the subject with great diffidence, seeing that my Lord Chief Justice has arrived at an essentially different conclusion.

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This is an action of libel brought by the plaintiff, who was a lieutenant colonel in the army, holding a commission as captain in Her Majesty's regiment of Coldstream Guards, against the defendant, who held the office of major general commanding the brigade of Foot Guards, of which the regiment of Coldstream Guards formed part. The alleged libels were contained in certain letters written and sent by the defendant to the adjutant general for the information of the commander in chief, enclosing and commenting upon letters which the plaintiff sent to the defendant and required him, as his superior officer, to forward to the adjutant general.

The question to be determined by the Court arises upon a demurrer to the plaintiff's replication to the defendant's plea. [His Lordship stated the substance of the plea and the replication.]

To this replication the defendant demurred, and stated as a ground of demurrer that no action is maintainable in respect of words written and published under the circumstances alleged in the plea, even if written and published maliciously and without reasonable, probable, or justifiable cause. It is to be observed that the replication admits the facts alleged in the plea, namely, that the letters in question were written and published by the defendant in the ordinary course of his duty as commanding officer to the adjutant general for the infor-

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mation of the commander in chief, and as an act of military duty and not otherwise, or for any other reason; yet it seeks to avoid the effect of that admission by the allegation that they were written and published of actual malice on the defendant's part, and without reasonable, probable, or justifiable cause, and not *bonâ fide* or in the *bonâ fide* discharge of the defendant's duty as such superior officer. I am of opinion that this replication is bad, and is no answer to the matters alleged in the plea. If it was the defendant's duty to write such letters and to make such reports touching the plaintiff's conduct, qualifications, and fitness as an officer, which is admitted by the replication, I do not see how the defendant's conduct becomes actionable, because he did what it was his duty to do maliciously, and not *bonâ fide* in the discharge of his duty. The defendant in substance says, "I did my duty, and nothing more than my duty," to which the plaintiff replies, "I admit that you wrote the letters and reports as an act of military duty, and not otherwise, but you did so maliciously, and without reasonable, or probable, or justifiable cause, and not *bonâ fide*." It is difficult to comprehend how it could be without reasonable, or probable, or justifiable cause if *done as an act of duty*, which it was incumbent upon him to do. It is to be observed that the replication contains no allegation that the statements contained in the reports were false to the defendant's knowledge, and I am clearly of opinion that without such an allegation the words "without reasonable, probable, or justifiable cause, and not *bonâ fide*," are, in connection with the admissions in the replication, simply insensible and repugnant. I must not be taken to admit that had such an allegation appeared on the record, it would

have entitled the plaintiff to judgment on the demurrer, but it would have given rise to different considerations. I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be. I think that the law regards the doing of the duty, and not the motives from or under which it is done. In short, it appears to me that the proposition resulting from the admitted statements on this record amounts to this—does an action lie against a man for maliciously doing his duty? I am of opinion that it does not; and therefore upon the pleadings as they stand, we might give judgment for the defendant.

The Attorney General however, did not rest the defendant's case on the effect of the admissions in the pleadings, but contended broadly that no action at law would lie against an officer of the army charged with duties such as those stated on the record for the discharge of them. He likened the case of the defendant to that of Judges of Courts of law, to grand jurymen, petty jurymen, and to witnesses, against whom no action lies for what they do in the course of their duty, however maliciously they may do it. He claimed for the defendant absolute immunity in respect of acts done in the course of duty on the highest grounds of policy and public convenience. No Judge, jurymen, or witness, he said, could discharge his duty freely, unless protected by a positive rule of law from being harassed with actions in respect of the mode in which he did the duty imposed upon him, and he contended that the position of the defendant and all officers similarly situated manifestly required the like protection to be

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afforded to them ; and there is, I think, little doubt that the reasons which justify the immunity in the one case do, in great measure, extend to the other. How could a commander freely communicate his real opinion to the adjutant general as to the conduct, qualifications, or fitness for a particular duty of any subordinate officer, under the dread, if that opinion were prejudicial to such officer, of an action for libel or other action, which, if he were not protected, might be brought against him by the officer who considered himself aggrieved ? To this it may be answered that no action would lie, as the communication would be privileged, if made *bonâ fide* and without malice. On the other hand it must be observed, that although the communication would be privileged under such circumstances, still cases might frequently occur in which the Judge on a trial at law would have to submit to a jury the most difficult questions of military discipline, such as whether orders disobeyed were proper orders for a commander to give, or were given maliciously and not *bonâ fide*, and whether the opinion expressed as to the competence of a subordinate officer for particular duties was justifiable or not. The employment of an incompetent man may cause the greatest disaster, and yet if the person whose duty it is to report as to the fitness or unfitness of such officer is to do it under the idea that the opinion he expresses may be overruled by a jury ignorant of such matters, how can he be expected to do it freely ?

The Attorney General not only relied upon the analogy he drew from the case of a Judge, jurymen or witness, but cited in support of his argument the opinion of Lords *Mansfield* and *Loughborough*, in *John-*

stone v. Sutton, in error (a); and there is no doubt that those eminent Judges did, in the Court of error, express an opinion in the analogous case of an action for a malicious prosecution of a naval officer by the commander in chief of a naval squadron before a naval court martial that no such action could lie. In the course of their observations they said, p. 549, "If this action is admitted, every acquittal before a court martial will produce one. Not knowing the law, or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them." And again, "if every trial," that is, by court martial, "is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief, will be." These considerations appear to me to apply à fortiori to a case like the present, in which the letters and reports complained of were written by the defendant in the performance of a positive duty, and for the purpose of obtaining an investigation of the matters therein alleged by a competent military tribunal.

It is to be observed, that the opinion expressed by Lords *Mansfield* and *Loughborough*, although of the greatest weight, and given after the fullest consideration, was not necessary to the judgment in that case, which actually proceeded on other grounds, and therefore does not amount to a decision binding us to declare that no such action will lie, and does not conclude us with reference to the present case, but the exposition of the law expressed in that opinion has been generally accepted, and referred to in other cases as a very weighty authority. It was evidently given after great consideration, and derives additional weight from the

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(a) 1 T. R. 544.

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fact that it was delivered in a Court of error, and after an argument displaying the greatest ability and research. It proceeds upon the principle that "the law will rather suffer a private mischief than a public inconvenience." It was observed by *Eyre* B., in delivering the opinion of the Court of Exchequer, p. 503, that the ground upon which the immunity from actions enjoyed by Judges and jurymen proceeds is, that "the law gives faith and credence to what they do; and therefore there must always, in what they do, be cause for it; and there never can be any malice in what they do." *Crompton* J., in *Fray v. Blackburn* (a), stated that the immunity of Judges of the superior Courts was established to secure their independence, and to prevent them from being harassed by vexatious actions. It is manifest that the administration of justice would be paralyzed if those who are engaged in it were to be liable to actions upon the imputation that they had acted maliciously and not *bonâ fide*; and it is to be observed that this absolute privilege is not confined to the administration of justice in the superior Courts, but it has been also applied in its fullest extent to Judges of the County Courts, *Scott v. Stansfeld* (b); nor is it indeed confined to the administration of justice; for it is well established that members of Parliament cannot be called in question out of Parliament for anything they may say in Parliament in the course of any proceedings in Parliament; and, in like manner, ministers of the Crown cannot, from reasons of the highest public policy and convenience, be called to account in an action for any advice which they think it right to tender to the Sovereign, however prejudicial

(a) 3 B. & S. 576. 578.

(b) 37 L. J. Exch. 155; S. C. *Scott v. Stansfeld*, L. R. 3 Exch. 220.

such advice may be to individuals. Do not these reasons of public policy and convenience strongly apply to the present case? Can the administrative duties discharged by officers of the army in the position of the defendant be liable to be reviewed by a jury in an action at law without producing the greatest public mischief and inconvenience? I shall presently shew that a special mode of redress for all officers in the army who consider themselves wronged by their superior officers in relation to the discipline and government of the army is expressly provided by the articles of war; and how inconsistent it would be that the judgment of a military tribunal, familiar with the question, should be liable to be reversed, and a different result obtained by the verdict of a jury in an action at law upon the very same facts? It is true that a standing army was unknown to the common law, and was always looked upon with great jealousy by our ancestors; but it is now, and has been for many years, regulated by Acts of Parliament, and by articles of war framed under them, which provide appropriate Courts and suitable machinery, and there is now a Secretary of State for War, expressly appointed by the Crown, with a series of officers charged with particular duties and functions, all tending to the regulation and government of Her Majesty's forces. I cannot but think that the analogous cases referred to do in principle apply to such a state of things.

Upon these considerations, and supported by the opinion of Lords *Mansfield* and *Loughborough* and that of other Judges, I come to the conclusion that the present action will not lie.

There was another ground of great importance upon which the Attorney General insisted, and which strongly

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supports the opinion above expressed. He argued that the plaintiff being at the time of the writing and publishing of the letters and reports an officer in the army, and the defendant being his commanding officer, and the letters and reports in question being matters simply relating to military duties and discipline, and to the administration of the army, the plaintiff, if he had ground of complaint in respect of them, was bound to make it to the tribunal specially provided by the Mutiny Act and articles of war relating thereto; that being, as he contended, the only tribunal to which a military officer could appeal in respect of such matters. There is no doubt that the 12th section of the articles of war does provide, that "If an officer shall think himself wronged by his commanding officer, and shall, upon due application made to him, not receive the redress to which he may consider himself to be entitled;—he may complain to the general commanding in chief of our forces, in order to obtain justice;—who is hereby required to examine into such complaint;—and either by himself, or by our Secretary of State for War, to make his report to us thereupon in order to receive our further directions." And by force of the annual Mutiny Act, under which they are framed, all the provisions of the articles of war apply to every person who is, or shall be commissioned or in pay as an officer^(a). It would seem to follow from the provisions thus made by the articles of war for a special mode of redress for every officer who may think himself wronged by his commanding officer, that it was intended that every officer aggrieved by any order or report made in the course of the administration of the army should follow the special mode of redress pointed out in the

(a) See the Mutiny Act of 1868, 31 & 32 Vict. c. 14. s. 2.

articles of war, and that in respect of any grievances or complaint arising out of such administration, he can have no redress in any other way. Certainly this view of the law is supported by the opinion of Lords *Mansfield* and *Loughborough* expressed in the case of *Johnstone v. Sutton*, in error (a), in which it is said, p. 549, "Commanders, in a day of battle, must act upon delicate suspicions; upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience. In case of a general misbehaviour, they may be forced to suspend several officers, and put others in their places. A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience. But what condition will a commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature?" I think that these considerations tend strongly to shew that when the Legislature provided special means of redress for officers, who should feel themselves aggrieved by any exercise of ordinary military authority or duty, by establishing special tribunals for the purpose by the articles of war, it intended to preclude such officers from appealing to the ordinary tribunals in respect of such matters. This view is confirmed by the opinion of *Willes J.* in *Dawkins v. Lord Rokeby* (b), upon which he nonsuited the plaintiff in an analogous action, and which, so far as I am aware, was not afterwards questioned. He is reported to have said, p. 841:—"With respect to military men, I beg to say that I cannot conceive anything more fatal to themselves—anything more fatal to the discipline or subordination of the army—if every officer who considers himself to

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(a) 1 T. R. 544.

(b) 4 F. & F. 806.

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have been slighted by his inferiors, or every officer aggrieved by his superiors, whom, having become a soldier, he has consented to submit to, should seek to undo their judgment before a tribunal which must necessarily have but slight acquaintance with those matters upon which it is called to pronounce an opinion. I have no doubt that this is the law, and I have no doubt that it is that which is most beneficial to the community." The case of *Grant v. Gould* (a) strongly supports the same view; and see *Barwis v. Keppel* (b). In the former case Lord *Loughborough* said, p. 100:—"The object of the Mutiny Act, therefore, is to create a Court invested with authority to try those who are a part of the army, in all their different descriptions of officers and soldiers; and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the Legislature to His Majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and due discipline of the army"; and in that case, prohibition being refused, Lord *Loughborough* further said, speaking of a military court martial sitting under the articles of war:—"This Court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the Courts of *Westminster Hall*, must depend upon the same rules, with all other Courts which are instituted, and have particular powers given them." It appears to me that upon the ground that the defendant and the plaintiff were both officers in the army, the defendant being the superior officer, and both being bound by the articles of war, it was the duty of the plaintiff to adopt the remedy thereby provided with

(a) 2 H. Bl. 69.

(b) 2 Wils. 314.

reference to the matters whereof he complains, and that he has no remedy at law in respect thereof.

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I am therefore of opinion that, upon all these grounds, our judgment must be for the defendant.

The judgment of LUSH J. was read by *Mellor J.*— It is admitted on the record that the letters complained of were reports made to the adjutant general of the army for the information of the commander in chief by the defendant, as the superior military officer of the plaintiff, in the discharge and under the obligation of military duty, touching the competence of the plaintiff as an officer, and his fitness for command in the field and in barracks: and the question turns on the validity of the replication, which alleges that these reports were made of actual malice, and without any reasonable, probable, or justifiable cause, and not *bonâ fide*, or in the *bonâ fide* discharge of the defendant's duty as such superior officer.

In the view which I take of this case it is unnecessary to determine what is the precise meaning intended to be conveyed by the latter allegation, whether it is merely a repetition in another form of the malicious motive, or whether, by saying that the letters were not written *bonâ fide*, or in the *bonâ fide* discharge of duty, is meant that the defendant knew the statements in them to be false. For, however they may be construed, I am of opinion that the question raised is one purely of military cognizance, and not within the province of a Court of law.

It is to be observed that the letters complained of reflect on the plaintiff in his capacity of military

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officer, and in that capacity only. They affect his character not as a citizen but as a soldier, and they were written not for circulation amongst the public, nor to a private individual, but to the proper military authority, and for the purpose of originating an inquiry into the competence of the plaintiff, and the propriety of an order which the defendant, as his superior officer, had made.

A standing army is an institution unknown to the common law. Without the Mutiny Act, the relation between the plaintiff and defendant out of and in respect of which this complaint arises could not have existed in time of peace; and an army raised in time of war would have been entirely under the dominion and controul of the Crown, and all questions of military discipline and abuse of power decided by its own absolute authority. On this ground it was held, in *Barois v. Keppel* (a), that an action would not lie by a private soldier against his commanding officer for reducing him on the field of battle from a serjeant to the ranks, though the act was alleged to have been done maliciously and without any reasonable cause whatsoever. If therefore the jurisdiction claimed for this Court by the plaintiff exists, it must be derived from the Act by which the army is created and governed. No such jurisdiction is given in terms, and so far from its being conferred by implication, I think it clear that the intention of the Legislature was to exclude the interference of the Courts of law, and to confine all matters of complaint of a purely military character to the military authorities. For the Mutiny Act, supplemented by the

(a) 2 Wils. 314.

articles of war, constitutes what purports to be a complete military code. This code professes to deal with the whole military conduct of every soldier in every department of the service. It provides rules for the protection of the subordinate as well as for the maintenance of the authority of the superior, for the redress of grievances as well as for the punishment of offences, and appropriate tribunals are constituted for administering and enforcing these provisions.

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Amongst the articles of war are two sections, 12 & 13, headed "Redress of Wrongs." The one applying to commissioned, the other to noncommissioned officers and privates. The first, which I presume is the one under which the plaintiff acted as stated in the plea, is to this effect:—[His Lordship read it] (*a*). Can it be reasonably inferred that any other mode or measure of redress was intended by the Act than that which is specified in this article? It is no argument to say that the remedy is imperfect because no pecuniary compensation is given to the injured party. That defect, if it be one, is a defect in the code itself, which we cannot remedy. The plaintiff has no reason to complain, for he has all which the law military to which he engaged to submit when he entered the service entitles him to have. The same code creates both the right and the remedy, and this Court cannot add to the one or the other.

The elaborate judgment of Lord *Mansfield* and Lord *Loughborough* in *Johnstone v. Sutton* (*b*), an analogous though not similar case, upholds the view I have taken upon grounds which I think equally applicable to this

(*a*) See this section set out, p. 808.

(*b*) 1 *T. R.* 544.

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case as to that ; and although the ultimate decision in that case was based upon an independent ground, I cannot but regard it as a judgment of high authority. As every year since that date Acts have passed for the government both of the army and of Her Majesty's marine forces without any intimation of a contrary view on the part of the Legislature, and as, although many occasions for questioning it must have occurred, that judgment stands unassailed, I look upon it as one which has received the tacit assent of both the Legislature and the profession. It is true that Lord *Campbell*, in *Dickson v. Lord Wilton* (a), and the Lord Chief Justice in *Dickson v. Lord Combermere and others* (b), left the question of malice to the jury, but in neither case was the point now in controversy raised. On the other hand, in *Dawkins v. Lord Rokeby* (c), *Willes* J. ruled that the action was not maintainable. His observations in that case, which have been quoted by my brother *Mellor* (d), I entirely adopt.

For these reasons I concur with my brother *Mellor* in pronouncing judgment for the defendant.

Judgment for the defendant.

(a) 1 F. & F. 419.

(b) 3 F. & F. 527.

(c) 4 F. & F. 806.

(d) See p. 809.

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HOLFORD, appellant, GEORGE, respondent (a).

Saturday,
June 6th.

1. Stat. 2 H. 6. c. 15. prohibits the placing of nets and engines across rivers so as to destroy the brood of fish and disturb the common passage of vessels, though they are not permanently fixed by day and night.

2. The Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109. s. 11. enacts, "No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters; . . . but this section shall not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant or charter or immemorial usage." For the purpose of catching fish with stop nets, a rope is extended across the stream from a stake driven into the shore near high water mark to an anchor in the bed of the river; each boat attached to this rope is furnished with a net about fifteen feet wide facing the tide, with its mouth kept a few feet under the surface of the water; when a fish enters the net the fisherman jerks the mouth of the net upwards out of the water, and takes the fish. The nets can only be used during certain states of the tide. Held, that stop nets were prohibited by stat. 2 H. 6. c. 15., and therefore unless they had existed from time immemorial were not excepted by stat. 24 & 25 Vict. c. 109. s. 11.

2 H. 6. c. 15.
Salmon
Fishery Act,
1861, 24 & 25
Vict. c. 109.
s. 11.
Fixed engine.
Stop net.
Immemorial
user.

CASE stated by the Commissioners for *English* Fisheries, pursuant to sect. 45 of The Salmon Fishery Act, 1865, 28 & 29 Vict. c. 121.

At a Court held by the Commissioners at *Gloucester*, on the 18th *May*, 1866, for the purpose of inquiring into the legality of the fixed engines situated in the river *Severn* and such part of the estuary thereof as had been included by certificate under the hand of the Secretary of State in the *Severn* Fishery district, the appellant, having been summoned before them, made three claims: (1) that 350 putchers at *Hope Pill*, (2) that three stop nets at *Hope Pill*, (3) that 130 putchers at *Hock Crib*, between high and low water mark in the river *Severn*, and within the manor of *Arlingham*, in the county of *Gloucester*, of which the appellant

(a) The report of this case has been unavoidably delayed.

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was the owner, were privileged fixed engines within the meaning of the Salmon Fishery Acts; and the Commissioners, having heard what was alleged and proved for and against the fixed engines, gave their decision that they were illegal and must be abated and removed.

The manor of *Arlingham* is within, or once formed part of, the great manor or barony of *Berkeley*, granted by a charter of King *Henry II.* to *Maurice of Berkeley*; and several ranks of putchers and stop nets had been legally used from time immemorial at certain places within the great manor of *Berkeley*. At the place where the manor of *Arlingham* abuts on the left bank of the *Severn* the river is a navigable tidal river or estuary, and is about half a mile wide between high water mark on either side. The manor of *Arlingham* is bounded on one side by the medium filum aquæ of the *Severn*.

In proof of the legality of the putchers and stop nets claimed by him, the appellant gave evidence, from which the grant of a several fishery before *Magna Charta* might be presumed, namely, that the putchers and stop nets claimed at *Hope Pill* had been continuously used there since 1816, and the putchers at *Hock Crib*, which is lower down the river than *Hope Pill*, had been continuously used there since 1841.

The mode in which stop nets are used is as follows: a stake is driven into the shore near high water mark, and a rope attached to it, which is run out towards the bed of the estuary nearly at right angles to the line of the shore, and the further end of the rope is fixed by an anchor in the bed of the river. Several boats are attached to this rope, which is used to steady them. The number of boats which may be used on one rope depends on the length of it. When the boats are

thus steadied by the rope, a net is used in combination with each in the following way: the net is so placed that the body of it lies across and under the boat, the mouth of the net which is about fifteen feet wide facing the tide on one side of the boat and the tail or end of the net stretching under and beyond the other side of the boat. By a combination of poles, the mouth of the net is kept a few feet under the surface of the water, and the fisherman, holding a string attached to the tail of the net in his hand, feels when a fish enters the net, and immediately jerks the mouth of the net upwards out of the water to prevent the escape of the fish, which he then takes out. The stop nets can only be used during certain states of the tide, according to the appellant for two or three hours, according to the respondent for six or seven hours, viz., from half flood to half ebb:

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The Commissioners were of opinion that, inasmuch as Magna Charta had prohibited the creating of a several fishery since that date, and also Magna Charta and subsequent statutes (Magna Charta, 9 *H.* 3. c. 23., 25 *E.* 3. st. 4. c. 4., 45 *E.* 3. c. 2., 1 *H.* 4. c. 12., 4 *H.* 4. c. 11., 12 *E.* 4. c. 7. (a)), had repeatedly prohibited the making or enhancing of weirs or kiddles in navigable rivers, the only ground on which the fixed engines called putchers could be legal was the presumption that the crown had granted before Magna Charta the right to use such fixed engines; that in like manner, inasmuch as the use of fixed nets involved a several fishery at the place where they were used, such several fishery could only have been legally created before Magna Charta;

(a) See these statutes commented upon in the judgment of the Court in *Rolle*, appt., *Whyte*, respt., 8 *B. & S.* 116. 138—142.

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and that the fixed nets themselves had been expressly prohibited by stat. 2 *H.* 6. c. 15., and no fixed net could be legal which had not been lawfully used before the date of that statute. They held that, though there was evidence from which they might reasonably presume that a several fishery had been legally created before Magna Charta, still, as no grant was produced, they could only infer from the subsequent user what the terms of that grant were; and that, taking the documentary evidence of a general grant of a several fishery with the proved user of putchers and stop nets at *Hope Pill* for only forty-five years previous to 1861, and the proved user of putchers for only twenty years previous to 1861 at *Hock Crib*, they could not reasonably presume that a grant of the Crown to use putchers at the places in question existed, nor that a grant of the Crown to use stop nets existed, nor that they were lawfully used before stat. 2 *H.* 6. c. 15. They were further of opinion that stat. 24 & 25 *Vict.* c. 109. s. 11. did not create any new right, but merely saved such rights as were legal before that date. Therefore they found that the putchers as well as the stop nets claimed were illegal.

The question for the opinion of this Court was, whether on the evidence the Commissioners ought to have presumed and found that the putchers and stop nets or any of them were lawfully exercised in 1861 by virtue of any grant or charter or immemorial usage.

Stat. 2 *H.* 6. c. 15. (a). “Item, It is ordained, That the standing of nets and engines called trinks, and all

(a) In the edition of the statutes, printed by command of King George 3, in pursuance of an address of the House of Commons, A. D. 1810, et seq., this chapter is numbered *xix.*

other nets, which be and were wont to be fastened and hanged continually day and night, by a certain time in the year (fichez and attachez continuellement de noet et jour pur certain temps [del an (a)]), to great posts, boats, and anchors, overthwart the river of *Thames*, and other rivers of the realm, which standing is a cause of as great and more destruction of the brood and fry of fish, and disturbance of the common passage of vessels, as be the wears, kydels, or any other engines, be wholly defended for ever; and that every person that setteth or fasteneth them hereafter to such posts, boats, and anchors, or like thing, continually to stand as afore is said (pur continuellement estoiser come dit est), and be duly thereof by the course of the law convict, shall forfeit to the King Cs. at every time that he is so proved in default: Provided always, That it shall be lawful to the possessors of the said trinks, if they be of assise, to fish with them in all seasonable times, drawing and pulling them by hand, as other fishers do with other nets, and not fastening or tacking the said nets to posts, boats, and anchors, continually to stand as afore is said; Saving always to every of the King's liege people their right, title, and inheritance in their fishings in the said water."

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The Salmon Fishery Act, 1861, 24 & 25 *Vict. c. 109*. s. 11. enacts, "No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters; . . . "and for the purposes of this section, a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine, but this section shall not affect any ancient right or mode of fishing as lawfully exercised at

(a) Interlined on the roll.

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the time of the passing of this Act by any person by virtue of any grant or charter or immemorial usage; provided always, that nothing in this section contained shall be deemed to apply to fishing weirs or fishing mill dams."

By sect. 4 (Interpretation clause), "'Fixed engine' shall include stake nets, bag nets, putts, putchers, and all fixed implements or engines for catching or for facilitating the catching of fish."

By The Salmon Fishery Act, 1865, 28 & 29 *Vict.* c. 121. s. 39., "'Fixed engine' shall in this Act and The Salmon Fishery Act, 1861, include any net or other implement for taking fish fixed to the soil, or made stationary in any other way, not being a fishing weir or fishing mill dam."

The report of the arguments and judgments is confined to the construction of stat. 2 *H.* 6. c. 15. As to the question upon the evidence it was contended for the appellant that the Commissioners were bound to find that at any rate the putchers and stop nets at *Hope Pill*, which had been used for forty-five years, were engines lawfully used by him at the time of the passing of The Salmon Fishery Act, 1861, by virtue of a grant or charter or immemorial usage. *The Mayor of Kingston upon Hull v. Horner* (a), *Carter v. Murcot* (b), *Gann*, appt., *The Free Fishers of Whitstable*, respts. (c), *Rawstorne*, appt., *Backhouse*, respt. (d), *Hale de Jure Maris*, ch. 6., *Harg. Tracts*, pp. 34-5, were cited. The Court held that it was a question of fact for the Commissioners to determine, and that they were not bound to presume as matter of law that the putchers and stop nets were a

(a) *Cowp.* 102.(b) 4 *Burr.* 2162.(c) 11 *H. L. C.* 192.(d) 37 *L. J. C. P.* 36; *L. R.* 3 *C. P.* 67.

mode of fishing which had existed at *Hope Pill* from time immemorial.

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The Attorney General, Sir *J. B. Karlake* (*The Solicitor General*, Sir *W. B. Brett*, and *Archibald* with him), for the respondent, contended that the stop nets were prohibited by stat. 2 *H. 6. c. 15.*, and were not privileged under stat. 24 & 25 *Vict. c. 109. s. 11.*, being fixed engines within stat. 28 & 29 *Vict. c. 121. s. 39.* He cited sect. 11 of stat. 24 & 25 *Vict. c. 109.*, *Bevins*, appt., *Bird*, respt. (a), *Olding v. Wild* (b).

Mellish (*Gilmore Evans* with him), for the appellant, contended that the stop nets were privileged under stat. 24 & 25 *Vict. c. 109. s. 11.*, and were not illegal or prohibited by stat. 2 *H. 6. c. 15.*, also that they might be legal although not used before the date of that statute. He cited *Thomas*, appt., *Jones*, respt. (c).

COCKBURN C. J. I think that the stop nets used in the manner stated in the case are within the mischief against which stat. 2 *H. 6. c. 15.* was directed, and therefore, unless they had existed from time immemorial, they were not lawfully used at the time of the passing of stat. 24 & 25 *Vict. c. 109.* so as to be within the proviso to sect. 11 of that statute. The first part of stat. 2 *H. 6. c. 15.* indeed prohibits "nets, which be and were wont to be fastened and hanged continually day and night," and subjects to a penalty persons who set or fasten them "continually to stand as afore is said." But the proviso shews the intention of the Legislature to have been to prohibit nets permanently fastened to

(a) 12 *L. T. N. S.* 306.(b) 14 *L. T. N. S.* 402.(c) 5 *B. & S.* 916.

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posts and anchors or like things, and continually standing by day and night so as to interfere with the free passage of the fish and the navigation of the river, and to allow those nets only to be used which were of the character of drag nets drawn by hand or in like manner. These stop nets for a certain continuous time, at any rate not less than between two and three hours, effectually bar the navigation, and also obstruct the passage of the fish and secure their being taken. So that although the obstruction to the navigation and to the passage of the fish is not continuous in the sense of its being kept up by day and night, yet it is of a serious character, and for all practical purposes is as mischievous as if it was there without any interval of cessation.

BLACKBURN J. These stop nets are clearly stationary or fixed engines within the meaning of the Salmon Fishery Acts, and whether they were lawfully used in 1861 depends upon whether they were legal within the meaning of stat. 2 *H.* 6. c. 15. That statute describes the way in which the prohibited nets are fastened, viz, to posts, boats and anchors, continually to stand day and night. But I do not think it is necessarily implied that the nets should be fixed for the whole twenty-four hours. These boats and nets were not in 1861 continually or permanently fixed; but according to the statement of the respondent they were set during all the time when the tide was up and when the river was practicable for the fish to pass and for the navigation to be carried on. If indeed these nets had been used before stat. 2 *H.* 6. c. 15. it would be the same as if they had been used before Magna Charta, and then they would have been a mode of fishing lawfully exer-

cised at the time of the passing of stat. 24 & 25 *Vict.* c. 109., by virtue of a grant or charter or immemorial usage, and therefore excepted by the proviso to sect. 11.

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MELLOR J. I agree with my Lord and my brother *Blackburn* in the construction of stat. 2 *H.* 6. c. 15. [His Lordship read the enacting part.] Then the proviso declares what in future shall be lawful, viz., "That it shall be lawful to the possessors of the said trinks, if they be of assise, to fish with them at all reasonable times;" and they are to have the fullest enjoyment of "drawing and pulling them by hand, as other fishers do with other nets," but they are not to fasten them, "not fastening or tacking the said nets to posts, boats, and anchors, continually to stand as afore is said." I think that the word "continually" in the enactment does not mean "permanently," but for a period which might be called "continuous"; and that is confirmed by the words in the proviso, which shew that the nets intended to be legalized were those worked by hand as "other nets."

LUSH J. At first I was inclined to adopt the construction that the earlier part of stat. 2 *H.* 6. c. 15. referred only to such stop nets as were not only fixed but kept permanently fixed. However I am now satisfied that the statute, after reciting the fact that nets and engines had been permanently fixed and greatly tended to the destruction of fish as well as interrupted the navigation, altogether prohibits them, and in the proviso proceeds to allow those nets only to be used which are drawn by hand.

Judgment affirmed.

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*Tuesday,
June 16th.*

**BUXTON against THE NORTH EASTERN Railway
Company.**

*Railway
Company.
Obligation to
fences.
Railways
Clauses Con-
solidation Act,
1845, 8 & 9
Vict. c. 20.
s. 68.
Carrier of
passengers for
hire.
Implied war-
ranty.
Contract to
carry over
another line.*

1. The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20. s. 68., imposes an absolute obligation on railway Companies as between them and the owners and occupiers of adjoining lands, but not as between them and their passengers, to make and maintain fences to prevent cattle straying on the line.

2. A railway Company, although bound to take reasonable care that the fences are sufficient to keep cattle from straying on the line, do not warrant to their passengers that the fences are such.

3. Where a person purchases a ticket from one railway Company for a journey part of which is on the line of another railway Company, and is injured by an accident to the train while passing on the latter line, occasioned by cattle escaping from adjoining land owing to a defect in the fence, the former Company are liable for negligence of the other Company in respect of the fence.

THE declaration stated that the plaintiff was a passenger of the defendants, to be safely and securely carried and conveyed upon certain railways on a journey from *York* to *Tamworth* for reward to the defendants; that it was the duty of the defendants to use due and proper care and skill in and about the managing of the railways and trains thereon, and in and about the safely and securely carrying and conveying the plaintiff on the journey. Yet the defendants did not use proper care and skill in and about the managing of the railways and trains thereon or in and about the carrying and conveying the plaintiff on the journey, but so negligently conducted themselves therein that the train by which the plaintiff was a passenger ran against a bullock then being upon the railway, and carriages in the train were thrown off the rails and broken, and the plaintiff was hurt, &c.

Plea. Not guilty.

On the trial, before *Kelly C. B.*, at the Spring Assizes at *Stafford*, it appeared that the plaintiff purchased a ticket as passenger from the station of the defendants' railway at *York* to convey him from thence through *Derby* to *Tamworth*, the journey between *Derby* and *Tamworth* being on the *Midland* Railway. The accident by which the plaintiff was injured occurred on the *Midland* line, and was caused by a bullock which had escaped from an adjoining field, separated from the railway by a quickset hedge with a line of posts and rails. The bullock had pressed against and broken one of the posts which was decayed, and so forced its way on to the line; the part decayed was below the surface of the ground, and not visible. It was objected, first, that there was no evidence which ought to be left to the jury of negligence in the defendants, and, secondly, that there was no warranty on the part of a railway Company to their passengers that the fences were sufficient.

The Lord Chief Baron overruled the first objection, reserving leave to the defendants to move to enter a nonsuit. In summing up to the jury he told them that the action was to be treated as if it was brought against *The Midland Railway Company*, and, after reading the 68th section of The Railways Clauses Consolidation Act, 1845, 8 & 9 *Vict. c. 20.*, he directed them that the law imposed on a railway Company the obligation of making and maintaining fences between the railway and adjoining fields sufficient to prevent the escape of cattle thereout on to the line, and he left it to them to say whether by reason of the fence not being in a proper state of repair the bullock had escaped and got on the line, telling them that if they were satisfied that

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the fence was not in a proper and sufficient condition the plaintiff would be entitled to their verdict.

The jury found a verdict for the plaintiff.

In *Easter* Term, *Matthews* obtained a rule nisi to enter a nonsuit in pursuance of leave reserved; or for a new trial on the ground of misdirection of the Lord Chief Baron in having directed the jury that it was negligence in the defendants if the fences proved insufficient, and that the breach of the statutory obligation to maintain fences was evidence of negligence.

The Railways Clauses Consolidation Act, 1845, 8 & 9 *Vict. c. 20. s. 68.*, enacts, "The Company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railways; that is to say:

* * * * *

Also sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners and occupiers thereof from straying thereout, by reason of the railway, together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary stiles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be:

* * * * *

Provided always, that the Company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the

railway, nor to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them."

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Huddleston, Griffiths and George Browne shewed cause.

—First. The jury found that the bullock got on the line by reason of the fence not being kept in a proper state; and the defendants, having contracted to carry the plaintiff safely to the place of his destination over the line of *The Midland Railway Company* as well as their own, are responsible for the negligence of *The Midland Railway Company*; *The Great Western Railway Company v. Blake, in error (a)*. [*Blackburn J. In Muschamp v. The Lancaster and Preston Junction Railway Company (b)* it was held that a railway Company receiving a parcel to be carried to a place beyond their own line were liable for the loss of the parcel after it had left their line.] In *The Great Western Railway Company v. Blake, in error (a)*, *Cockburn C. J.* said, pp. 991-2, "If a railway Company chooses to contract to carry passengers not only over their own line, but also over the line of another Company, either in whole or in part, the Company so contracting incurs all the liability which would attach to them if they had contracted solely to carry over their own line. Here there was a contract between *The Great Western Railway Company* and *The South Wales Railway Company*, by which the former are enabled to carry passengers not only over their own line, but also over the *South Wales* line. Under these circumstances, *The Great Western Railway Company* became responsible for the safety of every passenger

(a) 7 H. & N. 987.

(b) 8 M. & W. 421.

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throughout the distance for which they gave him a ticket, just as if they had conveyed him on their own line." In that case the accident arose from the train coming into collision with a locomotive engine left on the *South Wales* line by the servants of that Company. It makes no difference that the accident here was through the negligence of *The Midland Railway Company* in not keeping up a proper fence. For all purposes connected with the working of the railway the servants of the Company on whose line the accident happened are to be considered as the servants of the Company with whom the contract was made.

Secondly. Stat. 8 & 9 *Vict. c. 20. s. 68.* requires the Company to make and maintain "sufficient fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners and occupiers thereof from straying thereout, by reason of the railway." [*Blackburn J.* The statutory obligation is only towards the owners and occupiers of the adjoining lands.] The Company are responsible to a passenger who is injured by an accident arising from the breach of a statutory duty towards the owner of the adjoining lands. A passenger contracting with a railway Company must be presumed to know the statutory obligations incumbent on them and to have contracted with reference to those obligations. If the Company wilfully disregarded the duty cast upon them by sect. 68 they would be liable to an indictment. [*Blackburn J.* The duty imposed by that section is for the accommodation of the owners of adjoining lands, who can dispense with its performance if they choose. *Lush J.* Suppose the adjoining land belonged to the Company,

there would be no statutory obligation on them to maintain a fence.] Independently of stat. 8 & 9 *Vict. c. 20. s. 68.* (a), there is an absolute duty at common law on the part of a railway Company to do all that is necessary to protect passengers travelling on their line; *Redhead v. The Midland Railway Company* (b); and therefore they are bound to maintain sufficient fences on each side of the line. [*Blackburn J.* In that case, which is now before a Court of error, this Court held that a railway Company was not responsible for an accident to a passenger arising from a latent defect in the wheel of one of the carriages which no care or skill on their part could detect (c).]

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Matthews and H. James, in support of the rule.—Admitting that according to *The Great Western Railway Company v. Blake*, in error (d), the defendants are responsible in this action if the fences of the *Midland Railway* were defective, the direction of the learned Judge led the jury to suppose that the statutory obligation of a railway Company towards the owners and occupiers of adjoining lands was the measure of their duty towards the public; whereas the obligation of a railway Company towards its passengers with reference to the fences between the railway and the adjoining lands is only to take reasonable care and precautions to maintain the fences and keep the line safe; there is no warranty as to the fences either in the statute or at common law; *Fawcett v. The York and Midland Railway Company* (e),

(a) See also stat. 5 & 6 *Vict. c. 55. s. 10.*

(b) 8 *B. & S.* 371.

(c) The judgment of this Court was affirmed, see ante, p. 519.

(d) 7 *H. & N.* 987.

(e) 16 *Q. B.* 610.

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Ricketts v. The East and West India Docks and Birmingham Junction Railway Company (a), *The Manchester, Sheffield and Lincolnshire Railway Company*, appts., *Wallis*, respt. (b). The obligation of *The Midland Railway Company* towards the owner of the adjoining land cannot be transferred to the defendants, who merely use the line of *The Midland Railway Company* with their permission. [*Blackburn J.* By the decision in *The Great Western Railway Company v. Blake*, in error (c), the present case is disembarrassed from the statutory obligation; in that case *Crompton J.* said, p. 993, "When *The Great Western Railway Company* gave a ticket to the plaintiff to travel from *Paddington* to *Milford*, they took upon themselves all the responsibilities by which a railway Company is bound with reference to the carriage of passengers the whole distance." And, p. 994, "One of the responsibilities which they took upon themselves was that the line should be safe and secure the whole distance." Though he had just before mentioned the arrangement between the two Companies by which the fares were apportioned between them, his judgment does not rest entirely upon that.] That case decides that if one Company arranges with another to run trains over their line the latter Company are the agents of the former, so that the negligence of the servants of the latter may be fairly charged against the former: it does not alter the law as to the liability of a carrier towards the passengers carried. In *Red-head v. The Midland Counties Railway Company* (d) *Blackburn J.*, who dissented from the majority of the Court, held that there was a duty on the carrier to

(a) 12 C. B. 160.

(b) 14 C. B. 213.

(c) 7 H. & N. 987.

(d) 8 B. & S. 371.

supply a roadworthy vehicle, and that he was responsible for the consequences of his failure to do so though occasioned by a latent defect; but the duty of a railway Company as to their line is only to take reasonable care that it shall be secure; and there is no warranty by them of the sufficiency of the fences to keep cattle from straying on the line.

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BLACKBURN J. As to the first question, *The Great Western Railway Company v. Blake*, in error (a), decides that where a railway Company contracts with a passenger to carry him from one terminus to another, and the train in performing the journey runs over the line of an intermediate railway, it is part of the contract that the Company incurs whatever liability the other Company would incur as to one of its own passengers. According to that decision, which is a very convenient one, the defendants, when they gave the ticket to the plaintiff, impliedly contracted that they would be responsible for negligence in *The Midland Railway Company*. That disposes of the rule to enter a nonsuit.

The next question is as to the extent of the obligation of the defendants. The Lord Chief Baron directed the jury as if stat. 8 & 9 *Vict. c. 20. s. 68.* cast upon a railway Company an absolute obligation, as regards their passengers, to maintain a sufficient fence to prevent cattle straying on to the line. It is indeed clear that as between the owners and occupiers of the adjoining lands and the Company sect. 68 does create an obligation to maintain a fence, which is, so to express it, cattleworthy. But the proviso at the end of the section shews that it is an enactment

(a) 7 *H. & N.* 987.

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for the benefit only of the owners and occupiers of the adjoining lands, for if they agree to receive and are paid compensation the Company are freed from the statutory obligation to make the fences. It is necessary therefore to consider what is the obligation of the Company at common law, and the extent of it. The Company are bound to take all reasonable care to prevent the safety of passengers being endangered by cattle straying from the adjoining land on the line, where from the nature of things they would have notice that cattle might do so. And therefore when, either by prescription or by statute, they are bound to maintain fences, they ought to take every reasonable precaution that the fences are in a proper state and sufficient. And if in the present case the Lord Chief Baron had told the jury that *The Midland Railway Company*, being under a statutory obligation to maintain the fence, and knowing that there were cattle in the field, should have taken reasonable care that it was sufficient, and that if in consequence of that Company's servants not taking reasonable precautions the fence was not sufficient, it would be a breach of duty for which the defendants would be responsible, no objection could have been made to the direction. But the case was left to them as if the railway Company, being under an absolute obligation to the owners and occupiers of the adjoining lands, were also in the position of having warranted the plaintiff that no cattle should stray on the line. In my opinion the obligation cannot be carried to that extent. For the obligation to prevent cattle from trespassing on the line is not analogous to the duty of a shipowner to supply a seaworthy ship, or of a carrier by land to furnish a roadworthy carriage, or of a railway

Company to keep the line in repair. It cannot be more than an obligation to take every reasonable precaution which a prudent person would take to keep cattle off the line. Therefore I come to the conclusion that there ought to be a new trial. But as it is a point of some nicety, the plaintiff, if he should be so advised, may have leave to appeal.

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LUSH J. The first question is disposed of by *The Great Western Railway Company v. Blake* (a). And even if there were not that case, I should hold that a Company undertaking to carry passengers over another line becomes answerable for negligence happening on it as much as if it had happened on their own line. Therefore the Lord Chief Baron was right in declining to nonsuit.

The remaining question is, whether the direction of the learned Judge was correct. He stated to the jury that if a railway Company did not comply with the provisions of stat. 8 & 9 *Vict. c. 20. s. 68.* they were guilty of a breach of duty towards their passengers. But the obligation created by that section has nothing to do with the duty of the Company towards passengers. It is an absolute obligation as between the Company and the owners and occupiers of adjoining lands to maintain sufficient fences "for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners and occupiers thereof from straying thereout, by reason of the railway;" so that if the fence is not sufficient, and by reason of that insufficiency the cattle in the adjoining lands stray on

(a) 7 *H. & N.* 987.

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the line and are killed, the Company are answerable to the owners whether they were guilty of negligence or not. The obligation towards passengers arises at common law from the Company undertaking to carry for hire, and is an obligation to take all due care to prevent any accident to passengers travelling in their carriages. And where by arrangement with the Company an adjoining owner has taken on himself the obligation to make and maintain a fence, or has dispensed with any, if the want of a sufficient fence makes the railway unsafe, and an accident happens to passengers in consequence, the Company are answerable to them, though they are under no obligation to the adjoining owner. Therefore the proposition was laid down too broadly to the jury. The question left to them should have been whether the Company had been guilty of a breach of duty towards their passengers, their duty being to take all due care to prevent accidents. Consequently the rule for a new trial must be made absolute; but I agree that the plaintiff should have an opportunity of appealing, because the present case is analogous to that now before the Court of error from this Court (a).

Rule to enter nonsuit discharged.

Rule absolute for a new trial (b).

(a) *Redhead v. The Midland Railway Company, on appeal*, ante, p. 519.

(b) There was no further step, as the parties settled the action.

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JONES against The FESTNIOG Railway Company. *Wednesday, June 24th.*

Stat. 2 & 3 W. 4. c. xlviii., reciting that a railway "for the passage of waggons, engines, and other carriages," would facilitate the conveyance of coals and other heavy articles to certain slate quarries, and of slates, copper and other ores to the sea side, and would otherwise be of great public utility, empowered a Company to make and maintain a railway "passable for waggons and other carriages," and to erect and set up (inter alia) fire engines or other machines, and to do all other matters and things fit or necessary for the making and using the railway. While one of the Company's trains, carrying passengers in accordance with a certificate of the Board of Trade, and drawn by a steam locomotive engine, was passing along the line sparks from the engine were emitted and blown towards a haystack, which took fire and was burnt. Held, that the Company had not statutory authority to use locomotive engines, and therefore were liable to an action for the damage notwithstanding all reasonable precautions had been taken by them to prevent the emission of sparks.

*Railway
Company.
Locomotive
engine.
Statutory
authority.
Damage from
sparks.*

CASE stated on appeal from the County Court of *Carnarvonshire*, holden at *Portmadoc*.

This was an action to recover damages which the plaintiff had sustained, and which had been caused by the defendants under the following circumstances.

The defendants are a railway Company, incorporated by stat. 2 & 3 W. 4. c. xlviii. The plaintiff is the occupier of a tenement adjoining the Company's line. In the month of *August* one of the defendant's trains, carrying passengers in accordance with a certificate of the Board of Trade, and drawn by a steam locomotive engine, was proceeding along the line, and, in passing the plaintiff's premises, sparks from the engine were emitted and blown towards a haystack belonging to the plaintiff, which immediately took fire, and, together with the building in which it was stacked, was burnt down. All reasonable precautions had been taken by the defendants to prevent the emission of sparks.

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It was contended by the defendants that, their Company being incorporated by Act of Parliament, and all reasonable and necessary precautions having been taken by them against the emission of sparks and fire from their engines, they were not liable for any injury done to adjacent property by reason of the escape of sparks from their engines. The plaintiff contended that the defendants were not empowered by their Act or by any other law to use steam locomotive engines, and that if they used them they were liable at common law for any resulting injury to adjoining property.

The Judge held that the defendants were authorised by law to use steam locomotive engines on their railway, and, having adopted all reasonable precautions against the emission of fire and sparks, were entitled to judgment.

The question for the opinion of this Court was, whether the defendants were authorised by law to use steam locomotive engines on their railway, so as to exempt them from liability for injuries done to adjoining property by reason of their using such engines, reasonable precautions being adopted by them to guard against such injuries.

Stat. 2 & 3 *W.* 4. c. xlviii. was passed in 1832, “for making and maintaining a railway or tramroad from a certain quay at *Portmadock*, in the parish of *Ynys-cynhaiarn* in the county of *Carnarvon*, to certain slate quarries, called, &c., in the parish of *Festiniog* in the county of *Merioneth*.” Sect. 1, after reciting among other things that “the making and maintaining a railway or tramroad or railways or tramroads, for the passage of waggons, engines, and other carriages, commencing at or near &c., and terminating at or near &c., will be

the means of opening a more direct, easy, cheap, and commodious communication between the interior of the principal district of slate and other quarries of the county of *Merioneth* and the various shipping places at and within the said several counties of *Carnarvon* and *Merioneth*, and will greatly facilitate the conveyance of coals and other heavy articles to the several slate and other quarries and mines in the said district, and the conveyance of the slates, copper and other ores, and other productions of the said slate and other quarries and mines, and of the surrounding country to the sea side, and will otherwise be of great public utility," incorporated *The Festiniog Railway Company*.

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Sect. 2 empowered the Company to make and maintain a railway or tramroad, railways or tramroads, to be called *The Festiniog Railway*, "passable for waggons and other carriages," and also complete and maintain inclined planes on such parts of the land as should appear to be necessary.

Sect. 3 empowered the Company, among other things, to erect and set up such "houses, warehouses, toll houses, landing places, weighing beams, cranes, fire engines, or other machines," as the Company should think necessary and convenient for the purposes of the undertaking; "and also to make, set out, and appoint such roads and ways, convenient for hauling or drawing of waggons and other carriages passing upon the said railway or tramroad, with men or horses, or otherwise," as the Company should think convenient; "and to construct, make, and do all other matters and things fit or necessary for the making, altering, preserving, improving, completing, and using the said railway or tramroad, wharfs and other works to be made or constructed in

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pursuance of and according to the true intent and meaning of this Act."

Sect. 5 enacted that the Company "in erecting or setting up any engine or engines, commonly called steam engines, shall use the most approved method to consume and burn the smoke arising therefrom, so as to prevent the same occasioning any nuisance whatsoever;" and if they should set up or use any steam engine without burning or consuming the smoke upon that principle, they were to pay for every neglect or default a penalty of 50*l.*, and the steam engine might be abated as a nuisance.

Sect. 10 enacted that where the railway crossed any public highway (not being turnpike) on a level, the Company should erect and maintain a sufficient gate on each side of the highway, which should be kept constantly shut, "except during the times when carriages passing along the said railway or branches shall have to cross such public highway, and then the same shall be opened for the purpose only of letting such carriages pass through; and the driver or person entrusted with the care of any carriage, or with any train of carriages, upon the said railway, &c., shall cause every such gate to be shut as soon as such carriage shall have passed through the same, under the penalty of 5*l.* for every default therein."

Sect. 17 prohibited the Company, in carrying the railway over *Traeth Mawr* embankment, from occupying more of the embankment than was absolutely necessary in laying the railway upon its surface, and not exceeding three feet in breadth between the rails upon any part of it.

Sect 31 gave compensation, to be settled by a jury, to any person who should sustain damage in his lands,

tenements, or hereditaments, "by reason of the execution of any of the powers given by this Act, and for which a compensation is not hereinbefore provided."

Sect. 120 prohibited, with certain exceptions, all persons from riding, leading, or driving any horse, cattle &c. upon the railway or tramroad, under a penalty to the Company not exceeding 5*l*.

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Morgan Lloyd, for the plaintiff.—The defendants are liable at common law for the injury done to the plaintiff by reason of the use of locomotive engines on their railway, and it is no answer that they adopted all proper precautions in the use of them, and were not guilty of negligence; *Fletcher v. Rylands, in error (a)*. *Blackburn J.*, in delivering the judgment of the Exchequer Chamber, p. 272, shews that the doctrine on which that case was decided was laid down as early as the *Year Book*, 20 *E.* 4. 11. pl. 10., by *Brian C. J.* Stat. 2 & 3 *W.* 4. c. xlviii. does not either expressly or by implication authorise the defendants to use locomotive engines; and stat. 5 & 6 *Vict.* c. 55., which by sect. 4 requires that before a railway is opened for the conveyance of passengers notice shall be given to the Board of Trade, does not empower them to give a certificate which would legalise the use of locomotive engines where it has not been authorised by the special Act. They were not much used in 1832 when the defendants obtained their Act, and the railway or tramroad was not constructed for them, being intended for the conveyance of coals, slates and minerals, and its width being by sect. 17 limited to three feet. Sect. 2 empowers the Company to make a railway or tramroad "passable for waggons and other

(a) 4 *H. & C.* 263; affirmed in *D. P.*, 37 *L. J. Exch.* 161; *L. R.* 3 *H. L. C.* 330.

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carriages ;” and sect. 119 gives all persons liberty to pass upon and use the railway or tramroad “with carts, waggons, or other carriages properly constructed,” upon payment of certain rates and tolls ; but the “other carriages” must be ejusdem generis, as waggons. Sect. 5, which enacts that the Company, “in erecting or setting up any engine or engines, commonly called steam engines, shall use the most approved method to consume and burn the smoke arising therefrom, so as to prevent the same occasioning any nuisance whatsoever, refers to stationary engines to be used for drawing waggons up the inclined planes on the line. Therefore the defendants are not within the exception in *Rex v. Pease and others* (a) and *Vaughan v. The Taff Vale Railway Company, on appeal* (b). [He also cited *Piggot v. The Eastern Counties Railway Company* (c).] The wind which blew the sparks to the plaintiff’s haystack was not such a vis major as exempts the defendants from their common law liability ; *Tubervil v. Stamp* (d).

Huddleston (Gainsford Bruce with him), for the defendants.—The wind which blew the sparks to the plaintiff’s haystack excuses the defendants ; *Tubervil v. Stamp* (d). [*Blackburn J.* It is not stated to have been a storm or tempest, which is the exception mentioned in that case.] The only difference between the present case and *Vaughan v. The Taff Vale Railway Company, on appeal* (b), is, that the Company in that case had statutory authority to use locomotive engines. [He also cited *Aldridge v. The Great Western Railway Company* (e).] Stat. 2 & 3 W. 4. c. xlviii. must be taken to authorise

(a) 4 B. & Ad. 30.

(b) 5 H. & N. 679.

(c) 3 C. B. 229.

(d) 1 Salk. 13.

(e) 3 M. & G. 515.

the use of locomotive engines. The preamble recites that the railway is intended "for the passage of waggons, engines, and other carriages." And sect. 3 empowers the Company to do "all other matters and things fit or necessary" for using the railway, and therefore sanctions all appliances which may be from time to time introduced by science (a). [He also referred to sects. 10, 31, 120.] The use of locomotive engines upon railways was recognized in 1823, as appears from *Rex v. Pease and others* (b).

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Morgan Lloyd, in reply.

BLACKBURN J. I think that the appellant is right, and that the Company are liable to make good the damage caused by the sparks from their engine. The general rule laid down in *Fletcher v. Rylands, in error* (c), as to liability in such cases is that, when a person for his own purposes brings on his land anything likely to do mischief if it escapes, the law casts upon him an absolute duty to keep it in at his peril, and if he does not do so he is answerable for the damage which is the natural consequence of its escape. The defendants in the present case used a locomotive engine from which sparks were likely to escape; and they must at their peril take precautions to prevent that escape; and if sparks escaped, even without negligence on their part, and did mischief, they are liable at common law to pay damages for the injury done. Exceptions to this liability are shewn in *Rex v. Pease and others* (b) and *Vaughan*

(a) See however, per *Shee J.*, in *Reg. v. The Bradford Navigation Company*, 6 B. & S. 631. 652.

(b) 4 B. & Ad. 30.

(c) 4 H. & C. 263. 271; affirmed in D. P., 37 L. J. Exch. 161; L. R. 3 H. L. C. 330.

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v. *The Taff Vale Railway Company* (a). In the former case, the defendants were authorized by Act of Parliament passed in 1821 to make a railway or tramroad adjacent to a highway, and by another Act passed in 1823 were authorized to use locomotive engines upon the railway or tramroad; and these frightened the horses of persons using the highway; but the Court held the defendants not liable to be indicted for a nuisance, on the ground that the latter Act gave them “*unqualified authority to use the engines.*” In *Vaughan v. The Taff Vale Railway Company, on appeal* (a), this principle was applied to a civil action. The Company were expressly authorised by sect. 86 of The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20., to use locomotive engines, and as a necessary consequence to carry fire along the railway, and the Exchequer Chamber decided that this express authority of the Legislature took the case out of the operation of the common law rule, subject to the condition that the Company took all reasonable precautions. *Cockburn C. J.* said, p. 685, “Where the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorised, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence the party using it is not responsible.” In order to bring the present case within that decision it is essential to shew that the defendants’ Act expressly authorised the use of locomotive engines: it is not enough to shew that the Act contained no words prohibiting their use, so that the defendants might use them

(a) 5 H. & N. 679.

as a person might on his own land, which he must do at his peril. The preamble of the Act incorporating the defendants' Company, stat. 2 *W.* 4. c. xlviii., recites the advantage which would accrue to the district from the making and maintaining a railway or tramroad "for the passage of waggons, *engines*, and other carriages;" that may refer to *locomotive* engines or to moveable machines such as cranes, which are mentioned in sect. 3. By sect. 3 the Company are empowered to make roads and ways convenient for hauling or drawing waggons and other carriages passing upon the railway "with men or horses, or *otherwise*"; the latter word may refer to locomotive engines, but more probably to stationary engines, which are the only ones mentioned in sect. 5. The utmost that can be said is, that the statute authorises the making of a railway or tramroad, and the drawing of carriages along it by some means or other, and does not prohibit the use of locomotive engines. It follows from the view I take that the decision of the Judge must be overruled, but it is a question of some nicety.

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LUSH J. The case raises a point of nicety, but I entirely concur with my brother *Blackburn*. I cannot see that the Company have any statutory authority to use locomotive engines. Therefore they are subject to the common law liability, and must use them at their peril. This principle is illustrated by *Fletcher v. Rylands*, *in error* (a), and the cases there referred to, and by passages in *Com. Dig.* tit. *Action upon the Case for Negligence* (A. 6.).

Judgment for the plaintiff for a new
trial, without costs.

(a) 4 *H. & C.* 263; affirmed in *D. P.*, 37 *L. J. Exch.* 161; *L. R.* 3 *H. L. C.* 330.

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[Saturday,
May 29th.]

*Joint Stock
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Forged trans-
fer of shares.
Share certifi-
cate.
Estoppel.
Remedy of
Company.
Companies
Act, 1862,
25 & 26 Vict.
c. 89. ss. 31.
35.*

In the matter of The Companies Act, 1862,
and of The BAHIA and SAN FRANCISCO
Railway Company, Limited, and of AMÉLIE
TRITTIN, R. BURTON and M. A. GOODBURN.

In the matter of The Companies Act, 1862,
and of The RECIFE and SAN FRANCISCO
PERNAMBUCO Railway Company, Limited, and
of AMÉLIE TRITTIN, J. J. LANGLEY, and
others (a).

T., the registered holder of five shares in a joint stock Company, limited, deposited the share certificates with a stockbroker. A forged transfer of the shares to *S.* and *G.* having been left with the secretary of the Company for registration, together with the share certificates, he in accordance with the usual custom of business registered the transfer and removed the name of *T.* from and placed the names of *S.* and *G.* upon the register as holders of the shares, and share certificates were handed to them. *B.* and *G.* having, through their broker, bought on the Stock Exchange five shares in the Company, *S.* and *G.* transferred the shares comprised in the forged transfer to *B.* and *G.* respectively, and they were registered as the holders of the shares, and share certificates were handed to them. Upon application to the Court under The Companies Act, 1862, 25 & 26 Vict. c. 89. s. 35., it was ordered that the name of *T.* be restored to the register, and a special case be stated between *B.* and *G.* and the Company for determining the amount of damages (if any) which the Company were liable to pay them. Held,

1. That the Company, by giving the certificates, represented that *S.* and *G.* were the lawful holders of the shares mentioned in them, intending that persons purchasing the shares should act thereon, and that, *B.* and *G.* having bona fide acted upon that representation, the Company were estopped from denying the truth of it.

2. That *B.* and *G.* were entitled to recover from the Company the value of the shares at the time the Company refused to recognise them as shareholders, with interest at 4 per cent.

3. *Quære.* Whether the Company had a remedy over against *S.* and *G.*?

IN Hilary Term, 1867, rules were obtained in these cases under The Companies Act, 1862, 25 & 26 Vict.

(a) The report of these cases has been unavoidably delayed.

c. 89. s. 35., on behalf of *Amélie Trittin*, and upon cause being shewn in the first of them on behalf of *R. Burton* and *M. A. Goodburn* and *The Bahia and San Francisco Railway Company, Limited*, it was ordered that *A. Trittin's* name should be restored to the register of the Company in respect of the five shares in the Company numbered &c., and that the Company should pay to *A. Trittin* any dividend that had fallen due since the shares were transferred from her name. And it was further ordered that a special case should be stated between *R. Burton* and *M. A. Goodburn* and the Company for the purpose of determining the amount of damages (if any) which the Company were liable to pay them respectively.

In the second of these cases a similar order was made in respect of twenty-six shares in *The Recife and San Francisco Pernambuco Railway Company*.

The following special case was accordingly stated in the first of these cases.

On the 8th *March*, 1866, *A. Trittin* was the registered holder of five shares in *The Bahia and San Francisco Railway Company, Limited*, and deposited the certificates of the shares with *T. C. Oldham*, a stockbroker, and requested him to keep them and to receive the dividends payable on them.

On the 17th *April*, 1866, a transfer of the five shares to *J. A. Stocken* and *S. Goldner*, purporting to be executed by *A. Trittin*, but which was admitted to have been a forgery, was left with the secretary of the Company for registration, together with the certificates of the shares.

The secretary of the Company in the ordinary course of business then sent by post to the last place of

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residence of *A. Trittin* a written notice that the deed of transfer had been received by him, and after ten days, having received no answer from her, he registered the deed of transfer, and removed the name of *A. Trittin* from, and placed the names of *J. A. Stocken* and *S. Goldner* upon, the register of shareholders as holders of the five shares, and share certificates in respect of those shares were handed to them.

In *May*, 1866, *R. Burton*, through his broker, bought on the Stock Exchange four shares in the Company, and *M. A. Goodburn*, by her broker, bought one share. About the same time *J. A. Stocken* and *S. Goldner* sold five shares in the Company to *A. Bristowe*, a stockbroker, and in pursuance of those contracts, transferred four of the shares comprised in the forged transfer to *R. Burton*, and the remaining one to *M. A. Goodburn*.

It was admitted that *R. Burton* and *M. A. Goodburn* entered into the contracts bonâ fide and for value of the shares without notice of any fraud, and according to the usual course of business with reference to the purchase of shares, and that on or shortly after the 28th *May*, 1866, they were duly registered by the Company as the holders of the shares, and share certificates in respect of the shares were duly handed to them. In these transactions everything was done by the Company in accordance with the usual course of business, and there was nothing in the circumstances so far as they were known to the Company to excite their suspicion, or to induce them to depart from the usual course of business.

The form of share certificate used by the Company was as follows :—

"Certificate of shares.

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" *Bahia and San Francisco Railway Company, Limited.*" Registered under the Joint Stock Companies Act
of 1856. 26th *January*, 1858.

Nos..... to

Five shares of £20 each.

" This is to certify that is the
registered holder of the shares Nos. to in the
above Company (subject to the Articles of Association),
on each of which there has been paid up to this day
three pounds.

" Given under the common seal of the Company, the
day of 1858."

"

Directors."

Among the articles of association attached to the
memorandum of association of the Company were the
following.

" 1st. Only such of the regulations of Table B. of
The Joint Stock Companies Act, 1856, as are expressly
set forth in these articles of association shall apply, and
the other regulations of Table B. shall not apply."

" 25th. The Board shall determine the mode and
conditions of and the charges for the transfers of shares,
but no such charge shall exceed 2s. 6d. for every trans-
feror named in the instrument of transfer, and no such
transfer not valid according to the law of *England* shall
be binding on the Company.

" 26th. Every original shareholder shall, on payment
of such sum, not exceeding 2s. 6d., as the directors pre-
scribe, be entitled to a certificate, under the common
seal of the Company, and under the hands of two of the
directors, specifying the share or shares held by him,
and the amount paid up in respect thereof;" &c.

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The questions for the opinion of the Court were, First. Whether, as against the Company, *R. Burton* and *M. A. Goodburn* were entitled to the shares in the Company or an equivalent number? Secondly. Whether they were entitled to any and what damages to be paid to them by the Company.

The special case stated in the second of these cases was to the same effect, except that *The Recife and San Francisco Pernambuco Railway Company* did not send to *A. Trittin* any letter or notice in writing that the deed of transfer had been left at the Company's offices, but the share certificates in respect of the shares mentioned in the transfer were, according to the usual course of business of the Company, left at the offices of the Company by the stockbroker before registration of the transfer.

It was admitted that, if the claimants were entitled to recover in the first of these cases, the claimants in the second must also be entitled.

The Joint Stock Companies Act, 1856, 19 & 20 Vict. c. 47. s. 9., enacts: "The memorandum of association may be accompanied by or have annexed thereto or endorsed thereon articles of association, signed by the subscribers to the memorandum of association, and prescribing regulations for the Company; but if no such regulations are prescribed, or so far as the same do not extend to modify the regulations contained in the Table marked B. in the Schedule hereto, such last mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the Company," and shall bind the Company and the shareholders.

Table B. is intituled "Regulations for management of the Company," and under the head "Shares" contains among other clauses.

“(8.) Every shareholder shall, on payment of such sum, not exceeding 1s., as the Company may prescribe, be entitled to a certificate, under the common seal of the Company, specifying the share or shares held by him, and the amount paid up thereon.”

By The Companies Act, 1862, 25 & 26 *Vict. c. 89. s. 25.* (corresponding to sect. 16 of stat. 19 & 20 *Vict. c. 47.*), “Every Company under this Act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars :

“(1.) The names and addresses, and the occupations, if any, of the members of the Company, with the addition, in the case of a Company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number : and of the amount paid or agreed to be considered as paid on the shares of each member :

“(2.) The date at which the name of any person was entered in the register as a member :

“(3.) The date at which any person ceased to be a member :”

“And any Company acting in contravention of this section shall incur a penalty not exceeding 5*l.* for every day during which its default in complying with the provisions of this section continues, and every director or manager of the Company who shall knowingly and wilfully authorise or permit such contravention, shall incur the like penalty.”

Sect. 31 (corresponding to sect. 21 of stat. 19 & 20 *Vict. c. 47.*). “A certificate, under the common seal of the Company, specifying any share or shares or stock

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held by any member of a Company, shall be *prima facie* evidence of the title of the member to the share or shares or stock therein specified."

Sect. 32 (corresponding to sect. 23 of stat. 19 & 20 Vict. c. 47.). "The register of members, commencing from the date of the registration of the Company, shall be kept at the registered office of the Company;" and shall during business hours, subject to such reasonable restrictions as the Company in general meeting may impose, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of 1s., or such less sum as the Company may prescribe, for each inspection; and every member or other person may require a copy of the register, on payment of 6d. for every hundred words required to be copied; and any Judge at chambers may by order compel an immediate inspection of the register.

Sect. 35 (corresponding to sect. 25 of stat. 19 & 20 Vict. c. 47.). "If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any Company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the Company, the person or member aggrieved, or any member of the Company, or the Company itself, may, as respects Companies registered in *England* or *Ireland*, by motion in any of Her Majesty's superior Courts of law or equity, or by application to a Judge sitting in chambers, &c., or in such other manner as the said Courts may direct, apply for an order of the Court that the register may be rectified; and the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the

case, make an order for the rectification of the register, and may direct the Company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained: The Court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the Company, and generally the Court may in such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the Court, if a Court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal, in the manner directed by The Common Law Procedure Act, 1854, shall lie."

Sect. 37 (corresponding to sect. 26 of stat. 19 & 20 Vict. c. 47.), "The register of members shall be *prima facie* evidence of any matters by this Act directed or authorized to be inserted therein."

By sect. 176, this Act, with the exception of Table A. in the first schedule, and subject to certain qualifications, applies to Companies formed and registered under the Joint Stock Companies Acts, or any of them, in the same manner in the case of a limited Company as if it had been formed and registered under this Act as a Company limited by shares, and in the case of a Company other than a limited Company as if it had been formed and registered as an unlimited Company under this Act.

Brown (W. G. Harrison with him), for the claimants.

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—This being a foreign railway the questions arise under stat. 19 & 20 *Vict. c. 47.* and 25 & 26 *Vict. c. 89.* The first of the articles of association provides that only such of the regulations in Table B. of stat. 19 & 20 *Vict. c. 47.* as are expressly set forth in them shall apply to it, and the 8th regulation is not among them. But by the 26th article every original shareholder is entitled to a certificate specifying the shares held by him, and when a transfer of shares takes place the transferee must have either the original certificate returned to him with an indorsement or a new certificate given to him, for it is stated that share certificates were handed to *Stocken* and *Goldner*, and to the claimants.

First. Stat. 25 & 26 *Vict. c. 89. s. 25.* imposes on the Company the absolute duty of keeping a correct register of the shareholders, and in registering *Stocken* and *Goldner* as shareholders they were guilty of negligence in law. [He referred to sects. 31, 32, 35, 37.] Before the Company register a transfer they should ascertain whether it was duly executed. The purchaser of shares has no means of ascertaining whether the transfer is genuine, and he would never be safe if he could not rely on the certificate produced by the vendor. Further, the Company were guilty of negligence in fact: in the first of these cases the secretary wrote a letter to the registered shareholder informing her of the transfer, but received no answer; in the second he did not write nor take any other step to ascertain whether the transfer was genuine. In *Ashby v. Blackwell* (a), where a joint stock Company had been guilty of negligence in fact in permitting a transfer of stock under a forged letter of attorney, the Company was directed to pay the purchaser the sum he had paid for the transfer, together with interest at 4 per

(a) 2 *Eden* 299., *Amb.* 503.

cent. ; and Lord *Northington* C. said, pp. 302-3, "I think it was not incumbent upon *Blackwell*," the purchaser, "to inquire into the letter of attorney, because I think the letter of attorney in this and similar cases is no part of the purchaser's title. The title is the admission into the Company as a partner pro tanto, he accepting the stock on the conditions of the partnership. The purchaser trusted nobody but the Company. He was admitted to this stock, and accepted the transfer according to the terms of the original deed of contract. He must not be deceived by the Company." In *Davis v. The Bank of England* (a), where stock in the funds had been transferred under a forged power of attorney, and the stockholder brought an action against the bank for refusing to pay him the dividends due thereon, *Best* C. J., in delivering the judgment of the Court, said, pp. 404-5, "It is the duty of the bank to prevent the entry of a transfer until they are satisfied that the person who claims to be allowed to make it is duly authorized to do so. They may take reasonable time to make inquiries and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be. It is the bank, therefore, and not the stockholder who is to suffer, if *for want of inquiring*, and it does not appear that any inquiry was made in this case, they are imposed upon, and allow a transfer to be entered in their books, made without a proper authority." And, pp. 407-8, "We are not called on to decide whether those who purchased the stock transferred to them under the forged powers might require the bank to confirm that purchase to them, and to pay them the dividends on such stocks, or whether their neglect to inquire into the authenticity of the power of

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(a) 2 Bing. 393.

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attorney might not throw the loss on them that has been occasioned by the forgeries. But to prevent as far as we can the alarm which an argument urged on behalf of the bank is likely to excite, we will say, that the bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stocks they sold you, the answer would be, the bank, in the books which the law requires them to keep, and for the keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners. If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? It has ever been an object of the Legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfers to all the various persons through whom such stock had passed." Though the judgment in that case was reversed on error (a), on the ground that the declaration did not allege that the requisite funds for payment of the dividends had been supplied to the bank by the Government, the doctrine laid down by the Court of Common Pleas was not overruled, nor was it questioned in *Stone v. Marsh* (b), and was afterwards recognised in *Coles v. The Bank of England* (c), *Sloman v. The Bank of England* (d), and extended to the register kept by a railway Company, *Taylor v. The Midland Railway*

(a) 5 B. & C. 185.

(b) 6 B. & C. 551. 563.

(c) 10 A. & E. 437. 449.

(d) 14 Sim. 475. 486.

Company (a), affirmed in D. P. *(b)*. [*Lush J.* referred to *Swan v. The North British Australasian Company, Limited (c)*, affirmed in error *(d)*.

Secondly. By stat. 25 & 26 *Vict. c. 89. s. 16.*, which is to the same effect as stat. 19 & 20 *Vict. c. 47. s. 10.*, the articles of association bind the Company and its members as if each member had subscribed his name and affixed his seal thereto, and there were contained in them a covenant on the part of each member to conform to all the regulations contained in them subject to the provisions of that Act. The relation of the members inter se very nearly approaches that of partners in an ordinary partnership; and the admission of *Stocken* and *Goldner* as shareholders under a forged transfer, and giving them certificates is a fraud upon the partnership. [*Cockburn C. J.* There is great difficulty in treating the claimants as partners, as there can only be a limited number of shareholders.] At any rate, the Company having de facto, though under a forged transfer, placed *Stocken* and *Goldner* upon their register, and having by issuing share certificates to them enabled them to sell the shares, are estopped, as against persons purchasing from them on the faith of their being on the register, from denying that they were rightly registered and the lawful holders of the shares in respect of which they were registered; *Ward v. The South Eastern Railway Company (e)* per *Crompton J.*, referring to *Freeman v. Cooke (f)*. Therefore the claimants having bonâ fide acted on the representation made in the share certificates are entitled to be indemnified.

The measure of damages is the value of the shares at

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(a) 28 *Beav.* 287.

(c) 7 *H. & N.* 603.

(e) 2 *E. & E.* 812. 823-4.

(b) 8 *H. L. C.* 751.

(d) 2 *H. & C.* 175.

(f) 2 *Exch.* 654.

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the time when the Company refused to recognize the claimants as shareholders.

Watkin Williams (Cohen with him), for the Company.—First. A Company established under stat. 25 & 26 Vict. c. 89. is a partnership with a specific number of shares. There is no duty on the part of the Company towards the transferees of shares or their assignees, to see that the deeds of transfer are valid or genuine. The sale of shares in joint stock Companies is effected through jobbers on the stock exchange, irrespective of any action on the part of the Company. [He cited *Grissell v. Bristowe*, in error (a).] And the purchaser does not bargain for any specific shares. Upon registering the transfer there is no acknowledgment on the part of the Company that the transferee is entitled to any specific shares in the Company, nor is there any contract between him and the Company. The Company are not bound to keep a register in strict compliance with all the regulations in the Act; *The East Gloucestershire Railway Company v. Bartholomew* (b). [Blackburn J. That was an action for calls, and the attempted defence was that in the register of the Company the shares were not distinguished each by its number.]

Secondly. When a transfer of shares is registered by a Company in ignorance that it is void they are not estopped from shewing that fact and that neither the transferor nor the transferee had any right or title to the shares. A mistaken registration of the transfer does not confer any right or title to the transferee; his remedy is against the vendors. In *Ashby v. Blackwell* (c)

(a) 38 L. J. C. P. 10; L. R. 4 C. P. 36, reversing the judgment below; 37 L. J. C. P. 89; L. R. 3 C. P. 112.

(b) 37 L. J. Exch. 17; L. R. 3 Exch. 15. (c) 2 Eden 299., Amb. 503.

there was negligence on the part of the secretary of the Company in acting upon a letter of attorney not attested according to their rules. The only case in point is *Hildyard v. South Sea Company and Keate* (a), where stock was transferred by the Company on a forged letter of attorney attested by two witnesses, and Sir *Joseph Jekyll* M. R. said, p. 77, "When the defendant *Keate* bought by letter of attorney, it was incumbent upon him, and at his peril, to see that such letter of attorney was a true one; it was more his concern and in his power to inquire into the reality of this letter of attorney, than of any other person, so that the rule of caveat emptor is in this case properly applicable to him." [Cockburn C. J. Here the Company gave certificates to the transferee. *Blackburn J. Hildyard v. South Sea Company and Keate* might apply if *Stocken* and *Goldner* were the claimants.] In *Swan v. The North British Australasian Company, Limited, in error* (b), Cockburn C. J. said, p. 188, "To bring a case within the principle established by the decisions in *Pickard v. Sears* (c) and *Freeman v. Cooke* (d) it is in my opinion essentially necessary that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered." And *Blackburn J.*, p. 181, "I agree that a party may be precluded from denying against another the existence of a particular state of things, but then I think it must be by conduct on the part of that party such as to come within the limits so carefully laid down by *Parke B.*, in delivering the judgment of the Court of Exchequer in *Freeman v. Cooke* (d). It is pointed out by *Parke B.*, in

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(a) 2 P. Wms. 76.

(b) 2 H. & C. 175.

(c) 6 A. & E. 469.

(d) 2 Exch. 654.

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the course of the argument in that case, that in the majority of cases in which estoppel exists, 'the party must have induced the other so to alter his position that the former would be responsible to him in an action for it'; and he had before pointed out that 'negligence,' to have the effect of estopping the party, must be 'neglect of some duty cast upon the person who is guilty of it.' And this, I apprehend, is a true and sound principle." Here every thing was done by the Company in the usual course of business. And it does not appear that the claimants ever referred to the register, and therefore they were not misled by the entry of the names of the transferees on the forged transfer. Further, the Company are not estopped, for the certificate is only evidence of the title of the holder of the shares as between him and the Company; if it is more, it is not a representation to the purchaser that the holder of it is a shareholder but only that he is on the register. [*Blackburn J. Stat. 25 & 26 Vict. c. 89. s. 31. makes the certificate prima facie evidence of title to the shares specified in it. Were not the certificates to Stocken and Goldner documents which reasonable men would take to be representations of the Company that they were entitled to the shares specified in them?*] The Company must issue a certificate; therefore it is not a voluntary statement made by them.

COCKBURN C. J. I am of opinion that our judgment must be for the claimants. The Company are required by statute to keep a register of shareholders, and have power to grant certificates stating that the persons named therein are the registered holders of the specified shares. The purpose of those certificates is to give additional facility to shareholders of the Company for

dealing with and transferring their shares. This is an advantage to the Company by making the shares more negotiable in the market and thus adding to their value. The certificate is made *prima facie* evidence of the title of the person named therein; it is a declaration by the Company to the world that that person is the registered shareholder of certain shares, and is given by the Company with the intention that it shall be used and acted upon as such in the sale and transfer of shares. In the present case the claimants entered into the contracts with their vendors *bonâ fide* and paid the value of the shares without notice of any fraud, according to the usual course of business with reference to the transfer of shares, and share certificates were handed to them. It turned out that their vendors had no shares, and that the Company ought not to have registered their names as shareholders or given them certificates, as they had no title. This brings the case within the principle of the decisions in *Pickard v. Sears* (a) and *Freeman v. Cooke* (b), viz., that if you make a representation with the intention that it shall be acted upon by another and he does so act, and thereby alters his position, you are estopped from denying the truth of the representation.

The only remaining question is, what redress the claimants have. There can be no doubt an action is maintainable against the Company, and in whatever form it might be brought the measure of damages would be the same. The claimants are entitled to such amount of damages as would place them in the same position they would have been in if the transfer of the shares to them had been valid and the Company had refused to

(a) 6 A. & E. 469.

(b) 2 Exch. 654.

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register their names. In that case they would be entitled to the market value of the shares at the time of the refusal. If there were no shares in the market at that time the jury would have to say what was a reasonable compensation for the loss of the shares.

BLACKBURN J. It is a great object with these Joint Stock Companies that their shares should be capable of being easily transferred; and accordingly the capital subscribed is divided into a certain number of equal shares, each distinguished by its number. It is provided by stat. 25 & 26 *Vict. c. 89. s. 25.* that the Company shall keep a register of its members containing certain specified particulars, among which is a statement of the shares held by each member, and the date at which the name of each person was entered in the register. In order to keep such a register, the Company must alter it when a transfer of shares is made, and enter the name of the person to whom the shares are transferred. And when a transfer is tendered to them to be registered, they should make inquiry into its validity. Sect. 31 provides that certificates under the Company's seal, specifying the shares held by any member, shall be *primâ facie* evidence of his title to the shares specified; and it is clear that the object of this provision was that these certificates should be documents upon which persons buying shares might safely act; therefore, when the Company grants a certificate they make a statement that the person to whom it is given is the holder of the shares specified in it. In the present case the Company were deceived, and induced, without negligence on their part, to receive as genuine a forged transfer; and accordingly made the register inaccu-

rate by placing the names of *Stocken* and *Goldner* upon it as the holders of particular shares when they were not; and the certificates which they gave them were untrue. But the Company have the means, which no one else has, of inquiring into the validity of the transfer. Although, according to the usage on the Stock Exchange, the claimants did not originally contract for the purchase of these particular shares, they afterwards received a transfer of them from *Stocken* and *Goldner*, and a certificate from the Company that *Stocken* and *Goldner* were the holders of them. It is clear that the Company made the statement in the certificates intending that persons purchasing the shares should act upon it, or at least knew that they might act upon it. And the claimants having bonâ fide acted upon that statement, and suffered damage, they are entitled to recover, on the principle of estoppel defined by Lord *Wensleydale* in *Freeman v. Cooke* (a). Suppose an action by the claimants against the Company for refusing to pay them the dividends on the shares. The plea would be that they were not the true owners of the shares; to that it would be a good replication that the Company were estopped from saying that they were not the owners because they had purchased on a statement of title made by the Company, and intended by the Company to be acted upon. The claimants therefore would be entitled to a verdict; and the value of the shares at the time when the fraud was discovered and the real owner claimed the shares would be the measure of damages.

MELLOR J. The action cannot be grounded on negligence, but may be maintained on the ground that the

(a) 2 *Exch.* 654. 663.

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facts amount to an estoppel on the Company from denying the title of the claimants. The Company may refuse to register the name of a transferee of shares as a member if they doubt whether the transfer of the shares is genuine, and may leave him to apply to the Court and make out his title. In the present case the Company, being themselves deceived, caused the transfer of shares to *Stocken* and *Goldner* to be registered, and gave them certificates to be used in the market as vouchers by the Company that they were the registered holders of the particular shares. The claimants purchased the shares, but it turns out that they acquired no title to them, and their names were removed from the register. I think they have a right of action against the Company for removing their names from the register, and thereby preventing them from having the advantage of the shares they had purchased; and if an action were brought the Company would be estopped from denying the title of the claimants. The measure of damages would be that stated by my brother *Blackburn*.

We need not decide whether the Company have a remedy over against *Stocken* and *Goldner*.

LUSH J. The case states that the claimants entered into the contracts for the shares according to the usual course of business, but not what the usual course of business is with reference to the purchase of shares. We must take it however that, the claimants having bargained in the share market for a certain number of shares, that number was offered to them, certificates at the same time being handed to them. By these certificates, under the seal of the Company, it is certified that *Stocken* and *Goldner* were then the registered holders of

the specified shares; the certificates being given by the Company to *Stocken* and *Goldner* in order that they might use them in the usual way. Then the question is, what did the certificates mean? Did they mean merely that the names of *Stocken* and *Goldner* were on the register, though the Company could not say whether they were entitled to the shares? The Company are to keep the register, and are the only persons who have controul over it, and they may refuse to register the name of a person until he shews that he is entitled to be on it. I think therefore the certificates must have meant that the Company had satisfied themselves that *Stocken* and *Goldner* were entitled to the specific shares. If a Company after registering names have any doubt about the title they should apply to the Court to expunge them. The claimants having acted upon the certificates the Company cannot deny the truth of them.

I agree with the rest of the Court that the claimants are entitled to recover from the Company the value of the shares at the time when they were deprived of them.

Brown asked the Court to award interest on the value of the shares, and stated the day on which the Company refused to recognize the claimants as shareholders.

It was ordered that the Company pay to the claimants the value of their shares on that day, and interest from that time at 4 per cent.

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Act, 1862,
25 & 26 Vict.
c. 89. s. 153.
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Contract for
sale of shares.
Transfer of
shares after
winding up
order.
Deed of
transfer.
Indemnity
against calls.
Action by
seller against
purchaser.
Plea.*

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The Companies Act, 1862, 25 & 26 Vict. c. 89. s. 153. enacts that where a Company is being wound up by the Court or subject to the supervision of the Court every transfer of shares made between the commencement of the winding up and the order for winding up shall, unless the Court otherwise orders, be void. Held,

1. That a contract for the sale of shares might be made in that interval, and a transfer of them registered after the order for winding up.

2. That as the vendor remains on the list of contributories settled at the time of the order for winding up, such a contract might be made upon the terms that he should be indemnified by the purchaser against future calls.

3. On a contract for the sale of shares it is not necessary that the vendor himself should transfer them.

4. After a Company had been ordered to be wound up, the plaintiff and defendant executed a deed, by which the plaintiff transferred and the defendant agreed to accept shares subject to the conditions on which the plaintiff then held them. To an action upon this deed the defendant pleaded that before the making of the deed a resolution of the Company had been passed for winding up the Company voluntarily, and a petition had been presented to the Court of Chancery for winding it up under the supervision of the Court, and the winding up had commenced, and the plaintiff knew of the resolution, and of the commencement of the winding up, but the defendant was ignorant of them; that no sanction of the Court or of the official liquidator or order of the Court as to the sale or transfer of the shares had been obtained or made; that at the time of the making of the deed the plaintiff was not a member of the Company, nor registered as such, of which the defendant was ignorant; that the defendant had not been registered or made a member of the Company, and there had been no default on the part of the Company in omitting his name from the register, and that the defendant never made any express agreement to pay or indemnify the plaintiff against any calls made upon the shares. On demurrer, held, that the plea was bad, inasmuch as

- (1). It was not alleged that the plaintiff was aware of the defendant's ignorance of the petition, &c.
- (2). The sanction of the Court for the sale of the shares was not required.
- (3). The fact of the plaintiff not being a member of the Company, and the defendant's ignorance of that fact, could only affect the damages.
- (4). The plea did not negative circumstances from which a contract to indemnify might be inferred.

THE first count stated that the Company after mentioned was formed and established under The Companies Act, 1862, and was ordered to be wound up by the Court of Chancery on a petition presented to

that Court ; and after the commencement, as defined by the 84th section, of such winding up it was agreed between the plaintiff and the defendant that the plaintiff should sell to the defendant, and the defendant should buy of the plaintiff, fifty shares in *The Joint Stock Discount Company, Limited*, at 2*l.* per share, the defendant to indemnify the plaintiff from all calls thereafter to be made upon the shares whilst the defendant should be entitled thereto. Averment of performance of conditions precedent. Yet the defendant had not indemnified the plaintiff from all calls thereafter made upon the shares, and the plaintiff was forced and obliged to pay 375*l.* for a call thereafter made upon the shares whilst the defendant was entitled thereto.

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Second count. That *The Joint Stock Discount Company, Limited*, was a Joint Stock Company limited by shares, formed and established under The Companies Act, 1862, the shares in the Company being transferable by deed ; and *A. K. Hichens* being a member of the Company, and the holder of 350 shares in it, for a price for the same paid by the plaintiff, duly executed a deed whereby he transferred the shares to the plaintiff ; and afterwards and before the plaintiff had become a member of the Company in respect of the shares, and before the plaintiff had been entered in the register of members of the Company in respect of the shares, a petition for winding up the Company was presented to the Court of Chancery, whereupon it was, on the 17th *March*, 1866, ordered that the Company should be wound up by the Court : and after the commencement, as defined by the 84th section of The Companies Act, 1862, of the winding up, to wit, on the 15th *March*, 1866, it was agreed between the plaintiff

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c. 89. s. 153.
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Transfer of
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RUDGE *against* BOWMAN.

The Companies Act, 1862, 25 & 26 Vict. c. 89. s. 153. enacts that where a Company is being wound up by the Court or subject to the supervision of the Court every transfer of shares made between the commencement of the winding up and the order for winding up shall, unless the Court otherwise orders, be void. Held,

1. That a contract for the sale of shares might be made in that interval, and a transfer of them registered after the order for winding up.

2. That as the vendor remains on the list of contributories settled at the time of the order for winding up, such a contract might be made upon the terms that he should be indemnified by the purchaser against future calls.

3. On a contract for the sale of shares it is not necessary that the vendor himself should transfer them.

4. After a Company had been ordered to be wound up, the plaintiff and defendant executed a deed, by which the plaintiff transferred and the defendant agreed to accept shares subject to the conditions on which the plaintiff then held them. To an action upon this deed the defendant pleaded that before the making of the deed a resolution of the Company had been passed for winding up the Company voluntarily, and a petition had been presented to the Court of Chancery for winding it up under the supervision of the Court, and the winding up had commenced, and the plaintiff knew of the resolution, and of the commencement of the winding up, but the defendant was ignorant of them; that no sanction of the Court or of the official liquidator or order of the Court as to the sale or transfer of the shares had been obtained or made; that at the time of the making of the deed the plaintiff was not a member of the Company, nor registered as such, of which the defendant was ignorant; that the defendant had not been registered or made a member of the Company, and there had been no default on the part of the Company in omitting his name from the register, and that the defendant never made any express agreement to pay or indemnify the plaintiff against any calls made upon the shares. On demurrer, held, that the plea was bad, inasmuch as

(1). It was not alleged that the plaintiff was aware of the defendant's ignorance of the petition, &c.

(2). The sanction of the Court for the sale of the shares was not required.

(3). The fact of the plaintiff not being a member of the Company, and the defendant's ignorance of that fact, could only affect the damages.

(4). The plea did not negative circumstances from which a contract to indemnify might be inferred.

THE first count stated that the Company after mentioned was formed and established under The Companies Act, 1862, and was ordered to be wound up by the Court of Chancery on a petition presented to

that Court ; and after the commencement, as defined by the 84th section, of such winding up it was agreed between the plaintiff and the defendant that the plaintiff should sell to the defendant, and the defendant should buy of the plaintiff, fifty shares in *The Joint Stock Discount Company, Limited*, at 2*l.* per share, the defendant to indemnify the plaintiff from all calls thereafter to be made upon the shares whilst the defendant should be entitled thereto. Averment of performance of conditions precedent. Yet the defendant had not indemnified the plaintiff from all calls thereafter made upon the shares, and the plaintiff was forced and obliged to pay 375*l.* for a call thereafter made upon the shares whilst the defendant was entitled thereto.

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Second count. That *The Joint Stock Discount Company, Limited*, was a Joint Stock Company limited by shares, formed and established under The Companies Act, 1862, the shares in the Company being transferable by deed ; and *A. K. Hichens* being a member of the Company, and the holder of 350 shares in it, for a price for the same paid by the plaintiff, duly executed a deed whereby he transferred the shares to the plaintiff ; and afterwards and before the plaintiff had become a member of the Company in respect of the shares, and before the plaintiff had been entered in the register of members of the Company in respect of the shares, a petition for winding up the Company was presented to the Court of Chancery, whereupon it was, on the 17th *March*, 1866, ordered that the Company should be wound up by the Court : and after the commencement, as defined by the 84th section of The Companies Act, 1862, of the winding up, to wit, on the 15th *March*, 1866, it was agreed between the plaintiff

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and the defendant that the plaintiff should sell his interest in fifty shares in the Company to the defendant at 2*l.* per share, the plaintiff to transfer such interest to the defendant, and the defendant to indemnify the plaintiff from all calls thereafter to be made upon the shares whilst the defendant should continue entitled thereto; and pursuant to the agreement, the plaintiff did transfer his interest in the shares to the defendant. Averment of performance of conditions precedent. Breach as in the first count.

Third count, for money paid.

Fourth count. That *The Joint Stock Discount Company, Limited*, was a Joint Stock Company limited by shares, formed and established under The Companies Act, 1862, and on the 17th *March*, 1866, the Court of Chancery ordered, on a petition presented on the 7th *March*, 1866, that the Company should be wound up by the Court; and after the commencement, as defined by The Companies Act, 1862, of the winding up, it was agreed between the plaintiff and the defendant that the defendant should buy of the plaintiff, and the plaintiff should sell to the defendant, fifty shares in the Company, the defendant to bear and pay all calls to be thereafter made on or in respect of the shares to which he should become entitled from or through the plaintiff in pursuance of the contract whilst the defendant should be so entitled. Averment of performance of conditions precedent. Yet the defendant did not bear and pay a call thereafter made on or in respect of the shares to which he became entitled from or through the plaintiff in pursuance of the contract whilst he was so entitled.

Fifth count. That the plaintiff and defendant respectively executed the following deed upon the terms

agreed on between them, that the defendant should, whilst entitled to the shares therein mentioned, indemnify the plaintiff in respect of the shares therein mentioned.

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“ I, *W. N. Rudge*, of the Stock Exchange, *London*, gentleman, in consideration of the sum of 100*l.* paid to me by *W. Bowman*, of &c., do hereby bargain, sell, assign, and transfer to the said *W. Bowman* fifty shares, Nos. &c., of and in the undertaking called *The Joint Stock Discount Company, Limited*: To hold unto the said *W. Bowman*, his executors, administrators, and assigns, subject to the several conditions on which I held the same immediately before the execution hereof. And I, the said *W. Bowman*, do hereby agree to accept and take the said shares, subject to the conditions aforesaid. As witness, &c.” (The deed was dated the 5th *April*, 1866.)

That the Company was a Joint Stock Company limited by shares, formed and established under The Companies Act, 1862 and had been before the execution of the deed ordered by the Court of Chancery, on a petition presented to the Court, to be wound up. And after the execution of the deed, and whilst the defendant continued to be entitled to the shares, a call was made and became payable in respect of the shares therein mentioned. Averment of performance of conditions precedent. Yet the defendant did not indemnify the plaintiff in respect of the shares, and did not pay the call, and the plaintiff was damaged, and was forced to pay, and paid the amount of the call, of all which the defendant had notice.

Second plea to the first count. That the plaintiff did not execute and deliver to the defendant a deed

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of transfer of the shares, nor did the plaintiff transfer the shares to him.

Eighth plea to the fourth count. That the plaintiff did not transfer the shares to the defendant.

Twelfth plea to the first, second, fourth, and fifth counts. That the agreements therein mentioned were for the purchase of shares in the Company, and the defendant by such purchase intended to become a member of the Company, and before the making of the agreements, or of the deed, a resolution of the Company had been passed, requiring the Company to be wound up voluntarily under and pursuant to the statute, and a petition had been presented to the Court of Chancery for the winding up of the Company voluntarily under the supervision of the Court, and the winding up thereof had commenced within the meaning of the statute, and the Company was afterwards wound up in pursuance of the resolution and petition. That, before and at the time of making the agreements and deed, the plaintiff knew of the resolution and petition, and of the commencement of the winding up of the Company, but the defendant was wholly ignorant of them. That no sanction of the Court or of the official liquidator of the Company, or any other sanction, to the sale or transfer of the shares had been obtained before or at the time of the commencement of the action, nor had the Court made any order as to the shares, or the sale or transfer thereof; nor has any such sanction or order been obtained or made. That at the time of the making of the agreements and deed the plaintiff was not a member of the Company, nor registered as such, of which the defendant was ignorant at the time of the making of the agreements and deed. That the de-

fendant has not been registered as or made a member of the Company, and that there has been no default on the part of the Company in omitting his name from the register of members of the Company or otherwise in relation to the shares. And that he never made any express agreement to bear or pay or to indemnify the plaintiff from or against any calls made upon any of the shares.

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Demurrer to the second, eighth and twelfth pleas. Joinder in demurrer.

Replication to the twelfth plea. That the defendant did not at any time apply or take any steps or proceedings whatsoever for procuring himself to be made a member of the Company, or to be registered in respect of the shares.

Demurrer, and joinder.

The Companies Act, 1862, 25 & 26 *Vict. c.* 89. s. 131. "Whenever a Company is wound up voluntarily the Company shall, from the date of the commencement of such winding up, cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof, and all transfers of shares except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the Company taking place after the commencement of such winding up shall be void, but its corporate state and all its corporate powers shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the Company are wound up."

Sect. 153. "Where any Company is being wound up by the Court or subject to the supervision of the Court all dispositions of the property, effects, and things in action of the Company, and every transfer of shares,

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or alteration in the status of the members of the Company made between the commencement of the winding up and the order for winding up, shall, unless the Court otherwise orders, be void."

Quain (*Philbrick* with him), for the plaintiff.—The defence to this action is founded upon sect. 153 of The Companies Act, 1862, 25 & 26 *Vict. c. 89.*: but that section does not invalidate contracts for the transfer of shares made after the commencement of a winding up of the Company. In the present case the contract was made in the interval between the petition for winding up and the order; the transfer was not till after the order. There is nothing to render such a contract illegal: it does not affect the Company, or the liability of the plaintiff as a contributory. In *Chapman v. Shepherd* and *Whitehead v. Izod* (a) it was held that a contract for the purchase of shares, entered into but not completed by transfer before a petition for winding up, was not rendered illegal by sect. 153; and in *Biederman v. Stone* (b) there was a similar decision as to the effect of sect. 131 on a contract for the sale of shares made after the commencement of a voluntary winding up.

The twelfth plea is bad, for it was not the plaintiff's business to get the defendant registered. And the statement that the defendant never made an express contract to indemnify the plaintiff does not amount to a statement that no circumstances existed from which a jury might infer such a contract as a matter of fact. Such a contract is implied by law from the matters appearing on the record. [*Lush J.* The transfer set

(a) 36 *L. J. C. P.* 113; *L. R.* 2 *C. P.* 228.

(b) 36 *L. J. C. P.* 198; *L. R.* 2 *C. P.* 504.

out in the fifth count shews an express contract of indemnity.]

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Macnamara (*Talfourd Salter* with him), for the defendant.—The object of the Legislature in sects. 131 and 153 of stat. 25 & 26 *Vict. c. 89.* was to prevent dealings in shares after the winding up of the Company had commenced. Sect. 131 invalidates transfers of shares “after the commencement of” the winding up. [*Lush J.* Sect. 153, which applies to the present case, invalidates them only when made “between the commencement of the winding up and the order for winding up.”] The action is founded on the contract of sale; not on the transfer of the shares. In order to support an implied promise to indemnify the seller against subsequent calls, the seller should transfer the shares to the purchaser, so that he may become a registered member of the Company. In *Walker v. Bartlett, on appeal* (a), it was held that there was such an implied promise on the part of the transferee to the transferor of shares, although it was not incumbent on the former to cause the shares to be registered in his name; but in that case the transferor had done all that was necessary on his part by executing a transfer in blank, and the decision was given on the principle acted upon in *Burnett v. Lynch* (b), *Qui sentit commodum sentire debet et onus*. In *Birmingham v. Sheridan, Re Waterloo Life &c. Assurance Company* (No. 4,) (c), there was an agreement that the plaintiff should sell and the defendant should buy 1000 shares in the Company for 250*l.*, and a deed of transfer was executed by both parties, the one selling

(a) 18 *C. B.* 845.(b) 5 *B. & C.* 589. 607.(c) 33 *Beav.* 660.

1868. and the other accepting the shares. But as the deed of settlement provided that the directors should have power to reject a person from becoming a shareholder in the Company, and the official liquidator refused to register the defendant as a shareholder, the Master of the Rolls held that the directors could not be compelled to admit him as a shareholder. He said, pp. 663-4, "It was a contract conditional on the Company's accepting the defendant as a shareholder. Whether it was so stated at the time of the contract is not of very much importance, because that must necessarily be implied in every contract for the sale of shares." "It is obvious that they" the directors "must have a very large discretion in such matters, or else it would be easy for shareholders, when they thought the Company was getting into difficulties, to get rid of their shares by putting a mere nominal shareholder on the register, the effect of which might be, to render it impossible for the creditors of the Company to get paid their debts, and would, at all events, throw the burden of the debts on those shareholders who remained." Then, advertng to the consequence of his decision that the contract between the parties could not be enforced, and to a passage cited in argument from the first edition of *Lindley on Partnership*, vol. 1, p. 608, to the effect that in all cases where shares are sold by a shareholder to another person, the duty of providing for all the future calls and liabilities falls upon the purchaser from the date of the contract; he said, p. 665, "That proposition assumes that the contract is duly carried into execution by the ultimate introduction of the purchaser's name upon the list of shareholders. In that case, the liabilities of the vendor
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with respect to the shares cease, and they attach to the purchaser from the date of the contract, as soon as the name of the purchaser has been entered in the register, when, as between them, it has reference back to the date of the contract. But unless the contract for sale can be carried into effect, that liability cannot, in the absence of any express stipulation, attach, because the person who agrees to purchase the shares is not the purchaser in the proper sense of the word, for he is not allowed to become a shareholder."

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As to the second and eighth pleas. [*Blackburn J.* It is clear that the plaintiff himself was not bound to execute a transfer, a transfer from a third person would be enough. Moreover, the plaintiff may have been ready and willing to transfer the shares, and the completion of the transfer may have been prevented by the refusal of the defendant, or by the winding up of the Company.] If the transfer was prevented by either of those events it should have been replied.

The twelfth plea shews that the defendant bought the shares with the intention of becoming a member of the Company, and that at the time of the purchase he was ignorant of the winding up of the Company, although it was known to the plaintiff; and that by reason of the winding up he was unable to get his name put upon the register, which, by sect. 23, is a step necessary to his becoming a member of the Company. The only mode by which he could have become a member of the Company would have been by rectification of the register under sect. 35; but that section, according to the opinion of Lord *Cairns* L. J., though dissented from by *Turner* L. J., applies only where the register is incorrect through default of the Company; *In re The London, Hamburg and*

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Continental Exchange Bank, Limited. Ex parte Ward (a); and it appears by the plea that here was no default by the Company. In *Re The London, Hamburg and Continental Exchange Company, Limited. Ward and Emerson's Case* (b), the Master of the Rolls held that under sect. 153 the Court had a discretion to make valid dealings with shares between a petition and the order for winding up, and in the exercise of that discretion made valid a transfer effected after a petition but before advertisement of it in the *Gazette*. That decision was however overruled on appeal (c). *Turner* L. J., said, *L. R. 1 Chanc. App. 436*, "I think that the discretion given by the 153rd section only authorises the Court to say that a transfer of shares, or an alteration of the status of a member of the Company, may be valid, notwithstanding it took place between the commencement of the winding up and the order to wind up. It does not in other respects alter the effect of the transfer or alteration of status, and here there occurs a difficulty in these cases which I find myself quite unable to surmount. These shares were not transferred into the name of the purchaser. The transactions were in this respect incomplete, and, under the circumstances of these cases, I do not think that a Court of equity could or would compel the purchaser to complete them, and to register the shares in his name." The twelfth plea also shews that the plaintiff was not a member of the Company, and therefore could not give or transfer to the defendant the power of becoming a member.

(a) 36 *L. J. Chanc.* 462; *L. R. 2 Chanc. App.* 431, discharging an order made by the Master of the Rolls, *L. R. 2 Eq.* 226.

(b) 35 *L. J. Chanc.* 652; *L. R. 2 Eq.* 231.

(c) 36 *L. J. Chanc.* 177; *L. R. 1 Chanc. App.* 433.

The replication to the twelfth plea is bad, for it was not the duty of the defendant to apply to be made a member of the Company. And the plea shews that it would have been useless to apply.

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Quain was not called upon to reply.

BLACKBURN J. Unless there is some clause in stat. 25 & 26 *Vict. c. 89.* to the contrary, I see no reason why a transfer of shares should not be registered after an order for winding up. It is true that subscribers to the memorandum of association, and persons who have agreed to become members of the Company, are not completely members until their names have been entered on the register of shareholders, but a transfer of shares may be registered at any time up to the filing of a petition for winding up. [His Lordship then read sect. 153.] The object of this provision is obvious; inasmuch as when a petition for winding up has been presented, shareholders might, in order to get rid of their liability, transfer their shares to insolvent persons, and the register might thus be made to consist of persons who had nothing to lose, the Legislature intervenes and says, that "every transfer of shares" "made between the commencement of the winding up" and the order for winding up shall, unless the Court otherwise orders, be void. I do not understand what is meant by the clause, "or alteration in the status of the members of the Company," for death or marriage is beyond the control of the Legislature. But, whatever it may mean, a transfer of shares may be made in the interval if the Court sanctions it; and I have no

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doubt the Court would sanction a transfer from an insolvent to a solvent purchaser, although not the converse. The order for winding up fixes as contributories all who are members at the time it is made; and, so soon as the list of contributories is settled, I see no objection to a transfer of shares being allowed. If a person on the chance of making a profit chooses to speculate in the shares of a Company which is being wound up, and the holder is willing to sell, there is nothing in point of law nor in the statute forbidding such a bargain. The seller would remain a contributory, and there is no section in the statute which says that a contributory may not bargain as to shares. Nor do I see why one of the terms of the bargain, which would not release the seller from his liability to the Company, should not be that the purchaser would indemnify him if called upon by the Company to pay a call.

It follows that all the counts in the declaration are good. The first and second counts state the agreement for the sale of the shares to have taken place, after the petition and *before the order for winding up*, on the condition that the defendant should indemnify the plaintiff from all future calls. The fourth count states the condition to be that the defendant should pay all future calls; and the fifth count sets out the deed of transfer, which shews that the defendant agreed to accept the shares subject to the conditions on which the plaintiff held them immediately before the execution of the transfer.

As to the twelfth plea, I have already disposed of the allegation that the defendant intended to become a member of the Company, but had not been registered: there is no reason why he should not now be registered.

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The allegation that the plaintiff knew of the commencement of the winding up but the defendant did not, only amounts to a fragment of an allegation of fraud ; it does not shew that the plaintiff was aware that the defendant did not know it. The answer to the allegation that the sanction of the Court or of the official liquidator had not been obtained for the sale or transfer is, that no such sanction is necessary. The allegation that the plaintiff was not a member of the Company, nor registered as such, of which the defendant was ignorant at the time of the purchase, is no answer to the action, though it may reduce the damages. The allegation that the defendant never made any express agreement to pay or to indemnify the plaintiff against future calls is, as my brother *Lush* observed, not consistent with the contract in the deed of transfer set out in the fifth count ; and further, in order to make this a good defence, the defendant must negative every possible state of circumstances from which such a contract to indemnify would be implied, either by law or by a jury. Therefore there is no allegation in the plea amounting to a defence to the action.

LUSH J. The first, second, and fourth counts allege a contract on the part of the defendant to indemnify the plaintiff against future calls. The twelfth plea concludes with an allegation that the defendant made no express agreement to that effect, but fails to state facts which would exclude an implied contract to do so. As to the other allegations in the plea. First. The contract of sale was not within the prohibition of sect. 153 ; therefore the defendant might have got his name entered on the register, and have become a member of the

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Company. Secondly. The allegation as to the defendant's ignorance does not amount to a plea of fraud in the plaintiff. Thirdly. The sanction of the Court or of the official liquidator was not necessary, as sect. 153 does not affect a contract for the sale of shares. Fourthly. There is an allegation that the plaintiff was not a member of the Company, but he must have been made a contributory. Fifthly. It is alleged that the defendant had not been made a member of the Company, and that there had been no default on the part of the Company in omitting his name from the register; but that does not exclude an implied contract to indemnify the plaintiff. Moreover upon the face of the deed of transfer there is an express contract that the defendant is to take the shares subject to the conditions on which the plaintiff held them; and *Burnett v. Lynch* (a) decides that where the assignee of a lease accepts the assignment subject to the performance of the covenants in the original lease, there is an implied duty on his part to indemnify the lessee from all consequences of a breach of the covenants in the lease.

The second and eighth pleas are clearly bad.

Judgment for the plaintiff.

(a) 5 B. & C. 589.

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IN THE EXCHEQUER CHAMBER.

The QUEEN, on the prosecution of the Vestry
of ST. GEORGE, HANOVER SQUARE, *against*
McCANN and another.

*Saturday,
June 13th.*

[Reported ante, pp. 33. 44.]

TULK *against* The METROPOLITAN Board of
Works.

*Tuesday,
June 6th.*

[Reported 8 B. & S. 777. 813.]

MEMORANDA.

In this Term,

Edward William Cox, Esq., of the *Middle Temple*,
was advanced to the degree of the coif, and gave rings
with the motto *Lex libertatis defensor*.

William Campbell Sleigh, Esq., of the *Middle Temple*,
was advanced to the degree of the coif, and gave rings
with the motto *Labore sine favore*.

Augustine Sargood, Esq., of *Gray's Inn*, was advanced
to the degree of the coif, and gave rings with the motto
Vincit omnia veritas.

In this Vacation,

In pursuance of The Parliamentary Elections Act,
1868, 31 & 32 Vict. c. 125. s. 11. subs. 8.,

Sir *William Baliol Brett*, Her Majesty's Solicitor

TRINITY VACATION.

1868. General, was appointed, by patent dated and signed on
 MEMORANDA. the 27th *August*, an additional Judge to the Court of
 Common Pleas, having been previously advanced to the
 degree of the coif, when he gave rings with the motto
Stare in antiquis viis.

Mr. Serjeant *Hayes* was appointed, by patent dated
 and signed on the 28th *August*, an additional Judge to
 the Court of Queen's Bench. He was knighted on the
 9th *December*.

Anthony Cleasby, Esq., one of Her Majesty's Counsel,
 was appointed, by patent dated and signed on the 28th
August, an additional Judge to the Court of Exchequer,
 having been previously advanced to the degree of the
 coif, when he gave rings with the motto *Compositum*
jus fasque. He was knighted on the 9th *December*.

Richard Raggallay, Esq., one of Her Majesty's
 Counsel, was appointed to succeed Sir *William Baliol*
Brett in the office of Her Majesty's Solicitor General,
 and was knighted on the 9th *December*.

REGULA
GENERALIS

REGULA GENERALIS.

TRINITY VACATION, 1868.

It is ordered that, from and after the first day of *Michaelmas* Term
 next inclusive, the rule 43 of *Hilary* Term, 1853, be rescinded, and that
 in lieu thereof the rule for the entry of all causes for trial in *London*
 and *Middlesex* shall be as follows (that is to say): "Causes for every
 sitting within Term or after Term shall be entered before five o'clock p. m.
 on the day next but one preceding the first day of such sitting."

A. E. COCKBURN.

COLIN BLACKBURN.

WM. BOVILL.

H. S. KEATING.

FITZROY KELLY.

MONTAGUE SMITH.

J. S. WILLES.

JAMES HANNEN.

July 9th.

END OF TRINITY VACATION.

CASES

1868.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

MICHAELMAS TERM,

XXXII. VICTORIA.

The Judges who usually sat in Banc in this
Term were:

COCKBURN C. J.

LUSH J.

HANNEN J.

HAYES J.

ROWE *against* HOPWOOD.

Wednesday,
November 4th.

The defendant having been supplied with goods during infancy was, after full age, furnished with an account of the items and prices, at the foot of which was the following memorandum, which he signed: "Particulars of account to end of year 1867, amounting to 162*l.* 11*s.* 6*d.*, I certify to be correct and satisfactory." Held not a ratification within stat. 9 G. 4. c. 14. s. 6. to support a count either for goods sold or upon an account stated.

Contract.
Infancy.
Ratification.
9 G. 4. c. 14.
s. 5.

DECLARATION for goods sold and delivered, and
upon an account stated.

Plea. Infancy.

Replication. That the defendant, after he attained the

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age of twenty-one years, and before action, by a writing made and signed by him, ratified and confirmed the debts and promises. Issue.

On the trial, before *Cockburn* C. J., at the Spring Assizes at *Cambridge*, the evidence in support of the replication was that, after the defendant came of age, the plaintiff submitted to him an account of the items with which he had been supplied, at the foot of which was written, "Particulars of account to end of year 1867, amounting to 162*l.* 11*s.* 6*d.*, I certify to be correct and satisfactory." The plaintiff asked him to sign it, and he did so. The Lord Chief Justice declined to leave this evidence to the jury, on the ground that the question whether the memorandum amounted to a ratification of the contract depended upon the construction of the document; and, being of opinion that it did not, he directed a nonsuit, reserving leave to move to enter a verdict for the plaintiff.

O'Malley moved accordingly.—"The general rule appears to be, that the contract of an infant, though it were not for necessities, is *voidable* only, and not void, provided it was for his benefit; and that if, on attaining the age of twenty-one years, he ratify a contract made by him during his nonage, it will bind him, although there was no new consideration for his subsequent promise;" *Chitt. Contr.* 148, 8th ed. By stat. 9 G. 4. c. 14. s. 5., "No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." [*Lush* J. Rati-

fication of a debt must include an intention to pay it, notwithstanding the party is not liable.] To take a case out of the operation of the Statute of Limitations the acknowledgment must be such that a promise to pay may be reasonably inferred; but in the case of infancy, per *Rolfe* B., delivering the judgment of the Court in *Harris v. Wall* (a), “(apart from Lord *Tenterden’s* Act),” “any act or declaration which recognizes the existence of the promise as binding is a ratification of it. Any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will in the case of an infant who has attained his majority amount to a ratification.” [*Lush* J. Suppose the defendant had added the words “I am not bound to pay.”] There would still be a recognition of the debt, which is distinct from a promise to pay it. [*Cockburn* C. J. In *Thrupp v. Fielder* (b) Lord *Kenyon* ruled that payment of money on account of a debt contracted during infancy was not sufficient to render a party liable, and that there must be an express promise to pay. *Hannen* J. referred to *Hartley v. Wharton* (c).] At any rate this is evidence of an account stated.

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COCKBURN C. J. There will be no rule. In order to entitle a plaintiff to maintain an action against a person for a debt contracted during infancy, stat. 9 *G.* 4. c. 14. s. 5. requires a ratification in writing of the contract by the party after full age; and the construction of the written document which is the foundation of the action is for the Court. Entirely concurring with the Court of Exchequer in the law laid down in *Harris v. Wall* (a),

(a) 1 *Exch.* 122. 130.(b) 2 *Esp.* 628.(c) 11 *A. & E.* 334.

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that there must be a recognition of the debt as binding on the party after he has attained his majority, I think the writing in the present case is not such a recognition. It is simply an acknowledgment that the items of the account of goods supplied to him were properly set out and the sums charged for them satisfactory if he had not been under age. The Legislature intended that infancy should be a protection from actions for debts incurred under age unless, after the infant reached the age of discretion, there was a written recognition by him of the debt as an existing liability. Here is no such recognition, and therefore the action is not maintainable.

LUSH, HANNEN and HAYES JJ. concurred.

Rule refused.

Friday,
November 6th.

BISSELL *against* JONES and others.

*Bankruptcy
Act, 1861,
24 & 25 Vict.
c. 134. s. 192.
Composition
deed.
Surety.
Proviso for
immediate
payment of
composition.*

By a composition deed made between the defendants of the first part, P. & Co. of the second part, and all the creditors other than P. & Co. of the third part, the defendants covenanted to pay P. & Co., with the general body of creditors, a composition of 5s. in the pound by two instalments, at four and twelve months, and the defendants and P. & Co. as sureties, by way of separate covenant, covenanted with the other creditors to pay them a composition of 5s. in the pound by instalments, at four and twelve months, provided that P. & Co. should not be liable under the covenant for a greater amount in the whole than 3000*l*. The defendants also assigned to P. & Co. all their stock in trade, &c., upon trust to sell and apply the proceeds (2) in payment of the composition; (3) in payment of the remaining 15s. in the pound on the debt owing to them, "in consideration of their undertaking the liability of suretyship." Provided also that, if P. & Co. should arrange with any creditor to make an immediate payment of the composition payable to him with a deduction by way of discount, they should be at liberty to repay themselves out of the trust premises the full amount of the composition payable to such creditor. Held, that the deed was a valid deed within The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192., inasmuch as

- (1). The trust for payment of the remaining 15s. in the pound to P. & Co. did not necessarily create an undue preference.
- (2). The proviso for anticipating payment of the composition to any creditor did not authorize P. & Co. to apply the assets inconsistently with the trusts for the creditors.

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BISSELLv.
JONES.**D**ECLARATION for goods sold and delivered.

Plea. A composition deed under The Bankruptcy Act, 1861, 24 & 25 *Vict. c. 134 s. 192.*, made the 1st *July*, 1867, between the defendants, the debtors, of the first part, *W. P. Price, R. Potter and C. Walker*, carrying on business under the style or firm of "*Price & Company*" of the 2nd part, and all the creditors of the debtors jointly, or of each or either of them separately, other than *W. Price, R. Potter and C. Walker*, of the third part, by which, after reciting that the debtors were jointly indebted to *Price & Company* in the sum of 644*l. 11s. 6d.*, and jointly or separately to other creditors, and that, the debtors being unable to pay their debts in full, it had been agreed that an arrangement should be made between the debtors and their creditors: It WAS WITNESSED, that the debtors did thereby jointly and severally covenant with *W. P. Price, R. Potter and C. Walker* to pay to them a composition of 5*s.* in the pound on the sum of 644*l. 11s. 6d.* by two instalments of 2*s. 6d.* in the pound at four and twelve calendar months from the 2nd *May* then last past, and the debtors, and *W. P. Price, R. Potter and C. Walker* (as sureties for them and by way of separate covenant), did thereby jointly and severally covenant with the several persons parties thereto of the third part that the covenanting persons, or some or one of them, would pay to the persons parties thereto of the third part respectively, a composition of 5*s.* in the pound on the amount of their respective debts, by two instalments of 2*s. 6d.* in the pound at four and twelve calendar months from the 2nd *May* then last past: provided that *W. P. Price, R. Potter and C. Walker* should not be liable under the

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covenant for a greater amount in the whole than the sum of 3000*l*. IT WAS ALSO WITNESSED that the debtors did assign unto *W. P. Price, R. Potter* and *C. Walker* all the stock in trade and effects then belonging or which might at any time thereafter belong to them in their business or in connection therewith, and all sums of money then due or which might thereafter become due to them or either of them under or by virtue of any contracts entered into by or with them in relation to their business, &c.: Upon trust that they should, at such time or times and in such manner as they should in their absolute discretion think fit, sell, call in, collect and convert into money the premises, and apply the moneys to arise thereby, or which should otherwise come to their hands, under or by virtue of any of the provisions of those presents, in manner following, that is to say, "First in payment of all the costs and expenses of this arrangement, and the negotiation preparatory thereto, and all the costs and expenses attending the preparation and execution of these presents, or otherwise in relation thereto, and all the costs and expenses which may be incurred in or about the execution of the trusts or powers of these presents, or any of them, or otherwise relating to the premises. Secondly, in or towards payment of the composition of 5*s*. in the pound, at the times and in manner hereinbefore mentioned in that behalf, in aid of the covenants for payment of such composition thereinbefore contained, and so as to indemnify the said sureties from their liability, and under their aforesaid covenant; and Thirdly, in or towards payment of the remaining 15*s*. in the pound of the said sum of 644*l*. 11*s*. 6*d*. due and owing to the said Messrs. *Price & Co.* as aforesaid, it being thereby stipulated that the

said Messrs. *Price & Co.* shall have the advantage of this security for the remainder of their debt in consideration of their undertaking the liability of suretyship as hereinbefore appears, and shall stand possessed of the surplus (if any) of the said moneys and premises in trust for the said debtors. Provided always, and it is hereby agreed and declared, that if the said *W. P. Price, R. Potter* and *C. Walker*, as such sureties as aforesaid, or any or either of them, shall arrange with any creditor to make an immediate payment of the composition payable to him under these presents, with a deduction therefrom by way of discount in consideration of such immediate payment, then and in every such case the sureties or surety making such immediate payment shall be at liberty to repay themselves or himself, out of the aforesaid trust premises, the full amount of the composition payable to such creditor under these presents, without deducting the sum so allowed to such sureties or surety for discount as aforesaid," &c. There followed other usual provisoes, a power of attorney from the debtors to *W. P. Price, R. Potter* and *C. Walker*, and a release of the debtors from the parties of the second and third parts. Averment of the performance of all conditions, &c., necessary to make the deed available under The Bankruptcy Act, 1861, and to release the defendants from the debts, and to make the deed binding upon the plaintiff, and that the plaintiff was an assenting party thereto, and was bound by the same.

Replication. That the plaintiff was not an assenting party to the deed.

Demurrer, and joinder.

Macnamara, in support of the demurrer.—The ques-

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tion is whether the deed set forth in the plea is a valid composition deed within The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192. If it is, the replication is bad.

First. The trust in favour of the parties of the second part, who make themselves liable as sureties to the extent of 3000*l.* for payment of the composition to the other creditors, and under which they may pay themselves 20*s.* in the pound, does not necessarily create an inequality between assenting and non-assenting creditors. It may be a very advantageous bargain for the other creditors to have their suretyship instead of the uncertainty of a dividend out of the assets of the debtors. [*Cockburn C. J.* We are with you on this point.]

Secondly. The clause enabling the parties of the second part to accelerate the payment of the composition to any creditor with a deduction by way of discount, and afterwards to repay themselves the full amount of the composition, gives them no more than a reasonable compensation, and does not injure the other creditors.

R. G. Williams, for the plaintiff.—First. The trust under which the creditors who became sureties will receive any surplus after payment of the composition in payment of the remaining 15*s.* on their own debt may work inequality, as they may thus get more than the other creditors. [*Lush J.* Or they may get much less.] In *Wells v. Hacon* (a) the only advantage which the deed gave to the creditor who became surety for the payment of the instalments was that it entitled him to payment of his instalments directly from the debtor,

(a) 5 B. & S. 196.

while the other creditors were to receive theirs through the trustee appointed under the deed.

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Secondly. The assignment by the debtors of their stock in trade was not absolute, but saddled with a trust; and the clause by which the sureties may prepay the instalments, deducting a discount, and repay themselves out of the trust fund, enables them to commit a breach of trust. [*Lush J.* Suppose there were no such clause in the deed.] Then the trustees would make the prepayment on their own risk. By the deed the creditors have three securities for payment of the composition, the covenant of the debtors, the covenant of the sureties, and the trust fund. But the sureties are only liable to the extent of 3000*l.*; and if the composition on all the debts amounted to more, and some creditors were paid in advance, the other creditors would lose the security of the trust fund: it might be exhausted by the sureties discounting the claims of creditors, and charging it with the full amount of the composition. The amount of the discount is not specified. [*Cockburn C. J.* It must be a reasonable rate.] In *Thompson v. Knight (a)* a clause giving the trustee a discretionary power to pay in one sum at such time or times as he should think fit, any creditor whose composition did not exceed 10*l.*, was held to create a substantial inequality in the rights of the creditors.

Macnamara was not called upon to reply.

COCKBURN C. J. As to the first objection founded upon the provision that the trustees, on becoming sureties for the payment of the composition to the other

(a) 4 *H. & C.* 629.

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creditors, should, supposing the assets realised amounted to more than 5s. in the pound, apply the excess towards payment of their own debt in full, the case is governed by *Wells v. Hacon* (a). "If," as I said in that case, p. 207, "we could see that the arrangement was collusive, or if the deed on the face of it gave an inordinate or unreasonable advantage to the surety, it would be void; but we must presume that this deed, being assented to by the requisite majority of creditors, is for the benefit of all concerned." So I say here. The tendency of the later decisions is to hold that the Legislature intended to give the majority of the creditors power to determine, notwithstanding the objections of the minority, what arrangement would be the most beneficial to the body of creditors. It is not for us to consider how far such a power is advantageous to the mercantile community. The whole question therefore is, whether this deed is collusive, or contains anything so extravagant as that non-assenting creditors ought not to be bound by it. Here is an insolvent estate from which the utmost the creditors can get is 5s. in the pound, and even that is doubtful. But a certain firm of creditors are so satisfied this amount will be realized that they are willing to guarantee payment of it to the general body of creditors on condition that if by their diligence and good management they can realize more it shall become their own. If the majority think this is an advantageous arrangement for the creditors I see no objection to it, there being nothing either collusive or intended to give an undue preference to a particular class of creditors.

As to the second point, on the clause which enables

(a) 5 B. & S. 196.

the trustees to pay an instalment in advance. I agree that the trustees are not authorized by that clause to deal with the trust fund otherwise than they might do if it had not been inserted. But, if they anticipate the time of payment to any particular creditor, when the time for distribution of the assets realized comes they may take credit for the instalment in full. Therefore the argument for the plaintiff falls to the ground.

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LUSH J. Stat. 24 & 25 *Vict. c.* 134. s. 192. leaves it to the majority in number and value of the creditors to make the contemplated arrangements; and a deed made with the assent of that majority is binding on all the creditors as if they had executed it, provided it be bonâ fide and for the equal benefit of assenting and non-assenting creditors. If these conditions are fulfilled, we have no power to inquire whether any particular stipulation in the deed is advantageous to the creditors or not. This deed, by necessary implication, gives to non-assenting creditors the same advantage which assenting creditors have under it; and if the trustees have an advantage, they purchase it by assuming the liability of sureties.

As to the other point also, I agree with my Lord. When the assets realised are not sufficient for payment of the composition to all the creditors, the trustees, if they anticipate payment of it to any creditor, must do so out of their own moneys. One class of creditors has the same power of going into the Court of Bankruptcy as the other to prevent a breach of trust.

HANNEN and HAYES JJ. concurred.

Judgment for the defendants.

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Monday,
November 9th.

*Lands Clauses
Consolidation
Act, 1845,
8 & 9 Vict.
c. 18.
ss. 18. 121.
Notice to treat.
Tenancy not
greater than
from year to
year.
Loss of trade-
profits.
Compensation.*

**The QUEEN *against* JAMES VAUGHAN Esq., and
The METROPOLITAN DISTRICT Railway Com-
pany.**

A yearly tenant of a public house received from a railway Company a notice to treat under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. s. 18., and a notice in pursuance of their Act of their intention at the expiration of six months to take the premises. He sent in his particulars of claim, and, the Company not taking possession at the expiration of six months, continued to carry on his business on the premises for two years at a reduced rate of profits, the Company having, by virtue of their powers, destroyed the surrounding neighbourhood. At the end of that time he was served with a summons to attend before a Metropolitan police magistrate, under s. 121., for the purpose of having the amount of compensation for his interest in the premises assessed. Held,

1. That he was not entitled to compensation for the depreciation in value of his interest in the premises in consequence of the execution of the works of the Company destroying the neighbourhood.
2. Nor for the loss of trade profits since the notice to treat.

IN *Trinity* Term, *Aston* obtained a rule calling upon *James Vaughan*, Esq., one of the Metropolitan police magistrates, and *The Metropolitan District Railway Company*, to shew cause why the magistrate should not assess the amount of compensation to be paid by the Company to *Edmund Furber* in respect of the damage done to his interest in certain land and premises by reason of the execution of the works of the Company, and resulting in a loss of trade profits up to the 29th *April* last from the commencement of the works, amounting to the sum of 700*l*.

The claimant was the occupier as tenant from year to year of a public house, known as *The Black Bull*, situate in *Little Chapel Street*, *Westminster*, with a

skittle ground, shed and yard adjoining, which *The Metropolitan District Railway Company* were empowered to take by virtue of *The Metropolitan District Railways Act, 1864, 27 & 28 Vict. c. cccxxii.*, which, by sect. 1, incorporated among other Acts *The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18.*, and *The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20.*

On the 16th *June*, 1865, the Company served the claimant with a notice to treat for the purchase of the skittle ground, shed and yard, demanding the particulars of his estate and interest therein, and of the claims made by him in respect thereof, and also with a notice, in pursuance of the 59th section of stat. 27 & 28 *Vict. c. cccxxii.*, that on or after the expiration of six months from the date thereof they intended to enter upon and take under the powers of their Act the tenements referred to, and in respect of which he was the party assessed to the poor rate. On the 7th *July*, 1865, he sent to the Secretary of the Company the particulars of his claim and of his interest in the premises, and claiming "for the goodwill of the business carried on upon the premises aforesaid 750*l.*"

In *December*, 1865, he received notice from the Company of their intention to apply to Parliament for an Act enabling them (amongst other things) to purchase additional lands for the purposes of their undertaking.

In *December*, 1867, he received a further notice from the Company of their intention to apply to Parliament for an Act enabling them (amongst other things) to extend the time granted for the purchase of lands, houses and other property, and the construction of works for the purposes of the railway.

On the 16th *March*, 1868, the contractor for the works of the Company entered on the skittle ground,

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and began to pull down the shed without any notice to, or consent of, the claimant; who thereupon commenced an action against the Company, and who obtained an injunction on the 18th *March*.

On the 28th *March* he was served with a summons to appear before one of the Metropolitan police magistrates for the purpose of the magistrate hearing and determining the applicant's claim to compensation under stat. 8 & 9 *Vict. c. 18. s. 121.*, and on the same day the Company gave him notice that they required possession of the skittle ground, shed and yard. On the 2nd *April* he gave notice to the Company, requiring them to purchase and take the whole of the property in his occupation.

On the hearing of the summons, on the 20th *April*, the applicant deposed that the net profits received by him in respect of the business carried on upon the premises for some time previously and up to *June*, 1865, amounted to 490*l.* per annum, and that in consequence of the execution of the works of the Company in destroying the neighbourhood near to and surrounding the house, by the demolition of the adjoining houses and otherwise, his net profits in the years 1866 and 1867, and in the year 1868 up to the 20th *April*, had decreased to 200*l.* per annum. He claimed compensation under the following, among other, heads: First. For the value of his interest in the premises at the present time, such as an incoming tenant would give. Second. For the depreciation in value of such interest caused by the Company's works having reduced the custom of the house. Third. For the loss of trade profits up to the present time from the commencement of the works. Fourth. For the value of fixtures and trade utensils and furniture to be paid for by an incoming tenant.

On behalf of the Company it was contended that the magistrate ought not to allow for the loss of trade profits.

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The magistrate assessed the compensation in respect of the applicant's unexpired term and interest in the public house, yard, shed and skittle ground, and for the usual allowances made by an incoming tenant for goodwill, and trade fittings and fixtures, and for the licence of the public house, and for the loss in respect of the depreciated value of furniture, at 837*l.* 18*s.* The injunction obtained in the action was dissolved on payment of that sum and costs, without prejudice to any other distinct claim.

Stat. 8 & 9 *Vict. c.* 18., "With respect to the purchase and taking of lands otherwise than by agreement," sect. 18, enacts: "When the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special Act, or any Act incorporated therewith, they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this Act to sell and convey or release the same, or such of the said parties as shall, after diligent enquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

"With respect to lands subject to leases," sect. 121 enacts: "If any such lands shall be in the possession of

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any person having no greater interest therein than as tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices, in case the parties differ about the same; and upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special Act."

Stat. 27 & 28 *Vict. c. cccxxii. s. 59.* "The Company shall not enter on or take any tenement under the powers of this Act until the expiration of six months after serving notice in writing of the intention to take the same on the party assessed for the poor rate of such tenement by serving such notice at such tenement."

Sect. 84. "All claims for compensation made upon the Company shall, if the person claiming to be entitled to compensation has no greater interest than as tenant for a year, or from year to year, in the lands in respect of which the compensation is claimed, be determined in manner provided by" stat. 8 & 9 *Vict. c. 18. s. 121.*

Hawkins (*Gadsden* with him) shewed cause.—Compensation cannot be given for the loss of trade profits occasioned by the destruction of the neighbourhood surrounding the applicant's house. An action would not lie against the Company if they had purchased the adjoining houses by private contract and pulled them down; *Rex v. The London Dock Company* (a), *The New River Company*, appts., *Johnson*, respt. (b), per *Cockburn* C. J., *In re The Stockport, Timperley and Altringham Railway Company* (c), per *Crompton* J., in the Bail Court.

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Aston, in support of the rule.—This is a question of right on stat. 8 & 9 *Vict. c. 18. s. 121.*, and the magistrate ought to have assessed the amount of compensation, leaving the claimant to enforce it as he might be advised. A notice to treat is not a requiring possession within that section so as to entitle the claimant to have compensation assessed; *Reg. v. Stone and The Metropolitan Railway Company* (d). And the claimant could not have a mandamus to the Company to assess compensation until notice given by the Company requiring possession of the premises, or the expiration of the six months after service of the notice under their Act. On the other hand, the Company were bound to take the land at the expiration of the six months; *Morgan v. The Metropolitan Railway Company* (e), where it was held that the claimant might recover more than nominal damages, and *Smith* J., 37 *L. J. C. P.* 272, referred to damage which might be sustained from “the delay by the Company in not performing their duty in carrying

(a) 5 *A. & E.* 163. 177.(b) 2 *E. & E.* 435. 442.(c) 33 *L. J. Q. B.* 251. 253.(d) 7 *B. & S.* 769.(e) 37 *L. J. C. P.* 265; *L. R.* 3 *C. P.* 553.

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out the proceedings to take the land within a reasonable time." In *Ricket v. The Metropolitan Railway Company* (a), and the other cases hitherto decided, the Company did not take land. Where they take land, it is a question of purchase, not of compensation for injuriously affecting land. [Cockburn C. J. Where land is taken, and by means thereof damage is occasioned to the rest of the property, the owner is entitled to compensation, as in *In re The Stockport, Timberley and Altringham Railway Company* (b); but here the damage is occasioned by what is done upon the land of other persons which the Company have taken.]

By sect. 121 of stat. 8 & 9 *Vict. c. 18.* the party is entitled to compensation for the value of his unexpired term or interest, and for any just allowance which ought to be made to him by an incoming tenant, "and for any loss or injury he may sustain." [Lush J. That must mean by taking his property. Cockburn C. J. The section must receive a reasonable construction.]

COCKBURN C. J. This rule must be discharged. When property is taken by a Company the tenant is entitled to compensation, to be assessed according to the rate of profit which he was then making by carrying on his business upon the premises; but as soon as the Company acquires the right of possession in the property the tenant's interest ceases; and if they take possession his business and profits must cease also. It is clear that the tenant cannot ask for compensation because a neighbouring property is taken by the Company. In the present case if the Company instead of

(a) 5 B. & S. 149; in *Cam. Scacc. Id.* 156; in D. P. 36 L. J. Q. B. 205; L. R. 2 H. L. C. 175.

(b) 33 L. J. Q. B. 251.

acquiring the surrounding property under their statutory powers had become possessed of it by private contract, and had demolished the houses built upon it, no action could have been maintained for the consequential damage thereby done to the premises. The destruction of the goodwill of the public house was within the powers given by the statute, and therefore compensation for the loss of it cannot be claimed, because it was done under the powers legitimately.

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The only ground on which with any show of reason this claim can be urged is, that the Company, instead of taking possession when they should have done so, and having the compensation at once assessed upon the profits the claimant was then making, allowed the matter to stand over for two years. But the claimant also allowed it to stand over, instead of insisting upon the Company taking the property at the end of the six months and enforcing his claim for compensation; and now he demands compensation on the footing of the trade profits which were made before the demolition of the neighbouring houses during the two years which have elapsed since the Company should have taken possession. But the claimant cannot insist on being paid both the value of his interest and goodwill in the premises at the time when the notice to treat was served upon him, and also compensation for the reduced rate of profit during the two years; for the keeping on the business was his own act. Therefore the magistrate was bound to exclude this item both under the circumstances of the case, and on the construction of stat. 8 & 9 Vict. c. 18. s. 121.

LUSH J. This is precisely the question decided in *Rex v. The London Dock Company* (a).

(a) 5 A. & E. 163.

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HANNEN J. It is desirable to adhere to the rule that the only subjects of compensation under stat. 8 & 9 Vict. c. 18. are those which would have been actionable if done without the authority of an Act of Parliament. Whether the compensation is claimed at once or after two years, in no case ought the loss which the party sustains from the pulling down of houses in the neighbourhood of a public house to fall upon the Company.

Rule discharged, without costs.

Saturday,
November 14th.

GRANT, appellant, The Local Board for the District of OXFORD, respondents.

General district rate.
Boat club.
Floating barge moored to posts fixed in bed of river.

The *Oxford University* Boat Club were possessed of a landing stage and a floating barge or house boat moored in the river *Isis* at a distance of thirty feet from the bank, by means of two iron rings, which were fixed to the barge, and passed loosely and moveably round two posts driven into the bed of the river. Between the barge and the bank four other posts were driven into the bed of the river, and a moveable frame of boards laid on the top of these posts, but not fixed to them, nor touching the barge or bank, formed the gangway from the barge to the bank. The barge was roofed over and formed a room, which was used by the members of the club as a means of access to their boats, and for reading and other amusements. No land was occupied with the barge, nor was the club owner of the posts. The posts had been driven into the bed of the river more than twenty years for the purpose of being used as aforesaid, and had remained and been so used without the leave or licence of the Corporation of the city of *Oxford*, who were owners of the soil of the bed of the river, and no rent had been paid or other acknowledgment made by the club. Held, that the club was not rateable in respect of the barge, which was a mere chattel, nor in respect of the posts, as they had no exclusive occupation of them.

SPECIAL case stated, in pursuance of stat. 12 & 13 Vict. c. 45. s. 11., upon an appeal against two general district rates.

The appellant was the secretary to the *Oxford University* Boat Club, and was for the purpose of this case

to be taken as the person liable in respect of the subject of the rates, if the club or any member of it was, in the opinion of the Court, liable to be rated in respect thereof. The respondents were the Local Board of Health duly empowered to make the rates.

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The rates were: First. A general district rate at 1s. 6d. in the pound, made by the respondents under and by virtue of the provisions of The Local Government Supplemental Act, 1865 (No. 5), 28 & 29 *Vict. c. 108.*, and of the Acts incorporated therewith, to which rates "the University Boat Club" was assessed as the occupier and owner of "posts fixed in the soil under the river and land occupied by the said posts, and by landing stage, platform, floating barge or house boat, and other things connected therewith, and with the said soil," "on the river *Isis*, adjoining *Christchurch Meadow*." Second. A general district rate at 8d. in the pound made under the provisions of the same Acts, in which the description of property rated was the same as in the first rate, with the addition of the words "called the University Boat House."

The bed of the river *Isis*, of which the mayor and corporation of the city of *Oxford* are seised in fee, forms part of the district of the *Oxford* Local Board.

The river is a navigable river, subject to the controul of the conservators of the river *Thames*, and is a public and common highway, over, along, and in which all the liege subjects of the Queen have of right free passage, navigation and anchorage with and for boats, barges, and other vessels.

The freemen of the city of *Oxford* of right enjoy the sole and exclusive right of fishing in the river, and every part thereof, so far as it flows over and along the bed of

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the river within the district of the Local Board, and of using for that purpose boats, barges, and other vessels.

The *Oxford University* Boat Club is composed of members of the University of *Oxford*, and is possessed of a barge or house boat floating on the river over the bed of the river, and moored at a distance of about thirty feet from the bank of the river nearest thereto, by means of two iron rings which are fixed to the barge, and pass loosely and moveably round two solid fixed posts which are driven into the bed of the river, and are of such a diameter as to allow the rings to pass freely up and down the posts, and thus to allow the barge to rise and fall with the water of the river. In some very dry seasons, when the water is low, though the bed of the river remains covered with water, the barge occasionally for a short time rests on the bed of the river. The barge, though capable of being moved, is never in fact moved from its station.

Between the barge and the bank of the river are four other posts driven into the bed of the river, two of which are at a short distance from the barge, and the other two at a short distance from the bank, and the club is also possessed of a moveable frame of boards joined together, which is laid down on the top of the four posts, but is not fixed to them, nor to the barge or bank; neither does the wooden frame touch the bank or the barge, but it forms with the posts the gangway from the barge to the bank, from which the approach is to the barge. The bank is the property of the Dean and Chapter of *Christ Church*.

All the posts were so driven into the bed of the river for the purpose of being used as aforesaid more than twenty years before the making of the rates, and have

remained so driven in and been so used, but without the leave or licence of the Mayor and Corporation of the city of *Oxford*, or of any other body corporate or person, and no payment of rent or other acknowledgment has ever been made in respect thereof by the club or by any member thereof, either to the Mayor and Corporation of the city of *Oxford* or to any other body corporate or person.

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The club is also possessed of several boats which its members use on the river, and besides the purposes after stated the barge is used to enable the members of the club to get conveniently into and out of their boats, and they are in the habit of stepping from the bank on to the wooden frame and walking along it, and then stepping off the wooden frame on to their barge, as one way of access to the barge, there being no other way of access from either bank of the river to the barge except by boats, but the members of the club have no legal right, title, or interest in or to the soil of the bank, or to pass or repass over or along the same.

The barge was built and is maintained by the subscriptions of the members of the club; it is roofed over and forms one room, with small partitions at one end for use as dressing rooms: the rooms are lighted by windows in the side of the barge above the water line. No person ever sleeps or resides in the barge, but it is used in the daytime only by the members of the club as a way of getting into and out of their boats, and for the purpose of putting on and taking off their boating dresses, and for reading and other amusements, at their free will and pleasure. The barge is regularly supplied with daily and other newspapers and reviews, and pro-

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duces no pecuniary profit or benefit whatever to the club or to any member thereof.

No house, building, land, tenement or hereditament is or ever has been occupied, held or used in connection or conjunction with the barge, unless the posts driven into the bed of the river can be considered such.

Neither the club, nor any member thereof, is the owner or occupier of any post or land, or landing stage, platform, floating barge or house boat, or other things connected therewith, or with the soil under the river, in the rates mentioned, or of any rateable property whatsoever, unless and so far only as the facts before stated may, in the opinion of the Court, make them owner or occupier of the whole or any part thereof, and liable to be rated in respect of that ownership or occupation.

No barge, landing stage, platform, post or other thing connected therewith, mentioned in the rates, has at any time been assessed to rates for the relief of the poor, nor has any part of the property above mentioned been at any time taxed, rated or assessed in any manner or for any purpose whatsoever.

The question for the opinion of the Court was, whether the club or any member thereof was liable to be rated for the whole or any part, and if any what portion, of the property described in the rates.

The case was argued *November* 11, 14, and judgment given on the latter day.

Maule (*Rochfort Clarke* and *Davenport* with him), for the appellant.—By The Local Government Act, 1858, 21 & 22 *Vict. c. 98. s. 55.*, “ the general district rates are

to be made and levied upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor." And by The Local Government Supplemental Act, 1865 (No. 5), 28 & 29 *Vict. c. 108. s. 8.*, lands, tenements, and hereditaments within the *Oxford* district not then assessed or assessable to rates for the relief of the poor "shall be assessable on a fair valuation thereof by an equal pound rate to the general district rates, to be from time to time made and levied by the Local Board." Therefore the University Boat Club are not liable to these rates unless they are in possession of some land, tenement, or hereditament. The case negatives any land having been occupied in connection with the barge, unless the posts driven into the bed of the river can be considered such. The landing stage is not fixed to the soil; it rests upon the posts, not upon the barge or the bank of the river. The barge is a yacht or floating vessel, and the club have access to it by a moveable platform. They have no exclusive occupation of the bed of the river by the barge moored to the posts; but at most a temporary easement only by sufferance of the Corporation of the city of *Oxford*, in whom the soil of the bed of the river is vested. The right of the barge to float on the river, which is a public highway, is undisputed; and it might at any time be cast off and sent adrift. If the barge is a nuisance to the river, the Conservators of the *Thames*, or the Corporation of *Oxford*, might remove it. The club could not bring trespass against any person who made another boat fast to the post. [*Hannen J.* The case does not state who drove the posts into the bed of the river.] They must have been placed there with the permission of the Corpora-

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tion of *Oxford*. In *Williams v. Jones* (a), following *Rex v. Nicholson* (b), and deciding that a ferry per se is not rateable, it is said, p. 350, "Some additional observation was made in this case upon the circumstance of the post driven into the soil, to which the ferry boats were sometimes made fast on the *Llan-dysilio* shore; but the Court considered that this did not essentially vary the present question: for the owner of the ferry was not found to have any property in the soil of the highway; and supposing that he had a right to make such a special use of the highway for the purpose of securing his ferry boats, that did not make him the occupier of the highway; nor gave him any exclusive possession of it; nor could he maintain trespass for any injury done to the soil at the landing places, which were common to all the king's subjects to land and pass upon." [*Lush J.* In *The Electric Telegraph Company*, appts., *The Overseers of the Township of Salford*, respts. (c), the Company were held rateable in respect of their posts and wires placed along the line of a railway Company, notwithstanding the latter might require their removal to a more convenient place.] There the telegraph Company had exclusive occupation of the soil when not interfered with by the railway Company. [*Hannen J.* Such posts as these are fixed in many rivers.] In *Watkins*, appt., *The Assessment Committee of the Gravesend and Milton Union*, respts. (d), the appellant, who had the exclusive right to moor his coal hulks to certain moorings in the *Thames* under a licence from the Conservators of the river, was held not liable to be rated as an occupier.

(a) 12 *East* 346.

(b) 12 *East* 330.

(c) 11 *Exch.* 181.

(d) 37 *L. J. M. C.* 73; *L. R.* 3 *Q. B.* 350.

Mellish (*Griffiths* with him), for the respondents.—

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The University Boat Club are in actual occupation of the posts which are fixed in the soil, and they are rateable in respect of them as much as a gas Company for their gas pipes, or an electric telegraph Company for their posts. These posts were put down without the leave or licence of the Corporation of the city of *Oxford*, for the purpose of being used as they have been, for more than twenty years before the making of the rate, and one barge only could be attached to the posts. The club cannot be permitted to say that their act of fastening the barge to the posts is illegal, and therefore they are not rateable. [*Cockburn* C. J. It would be of very little use to rate the posts.] Then the structure attached to the posts is rateable : it is in effect a floating club house permanently fixed in the river. The case is within *Reg. v. Leith* (a). [*Cockburn* C. J. Suppose in the present case there was no stage, there would only be a barge moored in the ordinary way, though the mooring place is permanent.] In *Forrest and others*, appts., *The Overseers of Greenwich*, respts. (b), the appellants were not in occupation of the bank of the river ; but there were two floating barges connected by chain cables fastened to anchors placed in the bed of the river : the posts in the present case are more permanently fixed than the anchors in that case. Lord *Campbell*, in delivering the judgment of the Court said, p. 899, “ Had the pier always rested on the ground, no question could have been raised as to its rateability. At low water it does rest on blocks fixed on the bed of the river for that purpose. At other times it floats ; but at all times it is kept in its place by

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(a) 1 E. & B. 121.

(b) 8 E. & B. 890.

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iron chain cables fastened to iron anchors placed in the bed of the river and by an iron chain attached to an iron staple fixed in the stone stairs which constitute the landing place. There it has remained for fourteen years; and there only can it be used for the purpose to which it is to be applied. It therefore has a locality; and the appellants are the occupiers of land by the use which they make of the blocks, of the stairs for holding the staples, and of the iron anchors permanently placed in the bed of the river . . . This case, therefore, comes much nearer *Reg. v. Leith (a)* than to *Reg. v. Morrison (b)*, on which the appellant's counsel mainly relied. There we held a floating dock not rateable; but for the reason that it had no fixed locality, that it actually was shifted about from place to place, and that it might be used for the purposes for which it was constructed, at one place as well as another, as a piece of moveable machinery. In the case now before us, there is a permanent and profitable occupation of the soil within the parish of the respondents, who are therefore entitled to our judgment." [Cockburn C. J. In that case the barge was attached to the shore by a chain fixed in the stairs. The cases have gone a long way in holding that if a structure is fixed in the river it is rateable; but the important element of an immoveable connection between the structure fixed in the river and the shore is wanting in the present case. The judgment in *Forrest and others, appts., The Overseers of Greenwich, respts.*, dwells upon both.] In *Watkins, appt., The Assessment Committee of the Gravesend and Milton Union, respts. (c)*, the Conservators of the *Thames*, who were owners of the moorings in the

(a) 1 E. & B. 121.

(b) 1 E. & B. 150.

(c) 37 L. J. M. C. 72; L. R. 3 Q. B. 350.

river, granted to the appellant a mere licence to use them; the case turned on whether he was occupier of part of the bed of the river. [*Cockburn C. J.* It may be that the occupier of that part of the bed of the river in which the posts are fixed is rateable, but how does it follow that the occupier of the barge is occupier of land?] The barge increases the value of the occupation of the posts.

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Maule, in reply.—The ratio decidendi in *Reg. v. Leith (a)* is pointed out in the judgment of the Court delivered by Lord *Campbell* in *Reg. v. Morrison (b)*, where he says, p. 163, “Some expressions there used by the Court would in their generality countenance the doctrine for which the respondents now contend. But those expressions must be taken in reference to that case, which is materially different from the present. The pier there was permanently fixed to the landing place; and the one could not be used without the other. Besides, that case did not turn upon the construction of stat. 43 *El. c. 2. s. 1.*, but of a recent local Act, which contains words much more extensive with respect to property made rateable.” [*Cockburn C. J.* In *Reg. v. Leith* the Court proceeded on stat. 43 *El. c. 2.*]

COCKBURN C. J. Our judgment must be for the appellant; and I rest my opinion upon extremely narrow grounds. It is not necessary either to interfere with, or uphold, the cases which have been cited in support of the rates; for all of them are founded on occupation of the soil. It is not necessary to consider whether the boat club would be rateable if in occupation of posts,

(a) 1 *E. & B.* 121.(b) 1 *E. & B.* 150.

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or any thing else attached or affixed to the bed of the river, nor whether they would be rateable if in occupation of a particular mode of landing; for here the proof of occupation fails. There is nothing to shew that the posts are not in the occupation of the Corporation of the city of *Oxford* or whosoever is owner of the soil of the bed of the river. It does not appear how or by whom and by what authority they were fixed in the bed of the river. If they were fixed by the club, there is no evidence to satisfy us that the boat club had exclusive enjoyment of them: or that if any other persons navigating that part of the river, which is a public highway, were minded to treat them as mooring posts placed for the convenience of the public, or did any other act to interfere with the occupation of the club, the club could bring an action of trespass.

HANNEN J. The substance of the case is this: the University Boat Club occupy a floating boat, which is moored to posts fixed in the bed of the river: the particular part of the river where it is placed is an accident; it has remained there because it is not worth any person's while to require them to move it. It is said that the boat club occupy the posts by the floating barge, which is attached to them, and that that occupation is ancillary to the occupation of land. Nothing can be more artificial than this reasoning; and it is not sound. Whether the barge is attached to the posts by a rope or chain, as it probably was at first, or by rings when it became more permanent, the character of the use of the posts is not changed; the boat club have obtained no exclusive right to fasten their boat to the posts.

HAYES J. I concur with my Lord and my brother *Hannen*. The cases have gone far enough in holding things to be rateable as real property which substantially are chattels. This barge, if removed from its moorings, is a mere chattel. As to the posts, they *primâ facie* belong to the owner of the soil, and he has not demised them to the boat club.

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Judgment for the appellant.

The QUEEN *against* The Overseers of The
Parish of SCULCOATES.

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By stat. 35 G. 3. c. 101. s. 2., when any poor person brought before justices for the purpose of being removed by an order of removal is unable to travel by reason of sickness or other infirmity, or it would be dangerous for him so to do, they are to suspend the execution of the order until it can be safely executed without danger to any person who is the subject thereof; and the charges incurred by the suspension may be directed to be paid by the parish to which the poor person is ordered to be removed, in case removal shall take place, or in case of the death of such poor person before the execution of the order. By stat. 49 G. 3. c. 124. s. 3., where an order of removal is suspended on account of the dangerous sickness or other infirmity of any person or persons thereby directed to be removed, the execution of the order shall also be suspended for the same period with respect to every other person named therein being of the same household or family. On the 19th *November*, 1860, an order was made for the removal of *G.*, and *E.* his wife, from *I.* to *S.*, and suspended on account of the sickness of *G.* He continued sick until his death, and by reason thereof could not be removed: he died on the 13th *June*, 1861. Shortly before his death *E.* became unable to travel by reason of sickness, and continued so until her death. On the 25th *March*, 1866, *E.* became irremovable under stat. 28 & 29 *Vict.* c. 79. s. 8., in consequence of her residence for one year without relief in *I.* before the 19th *November*, 1860. She died on the 10th *April*, 1867. Held,

Order of
removal.
Suspension.
Husband and
wife.
Irremovability.
Order for
charges
incurred by
suspension.
Limitation of
time.
35 G. 3. c. 101.
s. 2.
49 G. 3. c. 124.
s. 3.
9 & 10 *Vict.*
c. 66. s. 2.
28 & 29 *Vict.*
c. 79. s. 8.
11 & 12 *Vict.*
c. 43. s. 11.

1. That the suspension of the order of removal continued to operate during the illness of the wife.

2. That on her death an order for the payment of the expenses of the maintenance of the paupers from the 13th *June*, 1862, till the 25th *March*, 1866, might be made under stat. 35 G. 3. c. 101. s. 2.

3. That such order was made within six months from the time when the expenses became payable, and therefore within the time limited by stat. 11 & 12 *Vict.* c. 43. s. 11.

4. Concessum. That the charges incurred in the relief of *E.* (1) during the year of her irremovability next after the death of the husband, under stat. 9 & 10 *Vict.* c. 66. s. 2., and (2) after she became irremovable under stat. 28 & 29 *Vict.* c. 79. s. 8., were not recoverable.

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UPON appeal against an order of justices of the county of *Middlesex* for the payment by the overseers of the parish of *Sculcoates* to the overseers of the parish of *St. Mary, Islington*, of the sum of 24*l.* 12*s.* 6*d.*, being the balance of 31*l.* 17*s.* 6*d.*, the amount of charges alleged to have been incurred by the parish of *St. Mary, Islington*, by the suspension of an order for the removal of *John Gibson* and *Elizabeth* his wife from the parish of *St. Mary, Islington*, to the parish of *Sculcoates*, the Quarter Sessions confirmed the order appealed against subject to following case.

On the 19th *November*, 1860, an order was made by two justices of the peace for the county of *Middlesex* for the removal of *John Gibson* and *Elizabeth* his wife from the parish of *St. Mary, Islington*, to the parish of *Sculcoates*, as the place of their settlement, and on the same day the order was suspended on account of the sickness and infirmity of *John Gibson*.

The order suspending the order of removal was as follows:—"Whereas it appears unto us *Charles Woodward* and *Arthur Ballantine*, Esqrs., two of Her Majesty's justices of the peace in and for the said county of *Middlesex*, the justices making the within order of removal, that the therein named *John Gibson* is unable to travel by reason of sickness and infirmity of body, and that it would be dangerous for him so to do: We the said justices do hereby suspend the execution of the said order of removal until we or any two of Her Majesty's justices of the peace for the said county are satisfied that it may be safely executed without any danger."

John Gibson continued sick and infirm up to the time of his death, and by reason of such sickness and infirmity

could not be removed from the parish of *St. Mary, Islington*, during his lifetime.

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The paupers, *John* and *Elizabeth Gibson*, resided together in the parish of *St. Mary, Islington*, continuously from the date of the order of removal and suspension until the death of *John Gibson*. At the date of the order of removal and suspension *Elizabeth Gibson* was about seventy-nine years old, but she was not sick or unable to travel, nor would it then have been dangerous for her to have done so. Some time after the date of the order, and shortly before her husband's death, she became unable to travel by reason of sickness and infirmity of body, and it would then have been dangerous to have removed her under the order.

John Gibson died on the 13th *June*, 1861, in the parish of *St. Mary, Islington*, and *Elizabeth Gibson* thereupon, under the provisions of stat. 9 & 10 *Vict. c. 66. s. 2.*, became and continued irremovable from the parish of *St. Mary, Islington*, for the period of twelve calendar months next after his death. From the time when she became unable to travel up to the time of her death she continued unable to travel by reason of sickness and infirmity, and it would have been dangerous to have removed her to *Sculcoates* at any time during that period.

After her husband's death she remained a widow, and continued to reside in the parish of *St. Mary, Islington*, until her death.

The order of removal of the 19th *November*, 1860, was never superseded, nor was a fresh order for the removal of *Elizabeth Gibson* obtained after the death of *John Gibson*, and the execution of the order of removal never was suspended by the justices by reason of any

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sickness or infirmity or inability of *Elizabeth Gibson*, or of its being dangerous for her to travel, nor was any further suspension of the order directed by the justices after the 19th *November*, 1860.

On the 25th *March*, 1866, *Elizabeth Gibson* became irremovable from the parish of *St. Mary, Islington*, under stat. 28 & 29 *Vict. c. 79. s. 8.*, and so continued and was irremovable therefrom at the time of her death, in consequence of her residence for one year without relief in the parish of *St. Mary, Islington*, before the 19th *November*, 1860. She died on the 10th *April*, 1867.

From the date of the order of removal until the death of *John Gibson* the paupers were relieved by the parish of *St. Mary, Islington*, and after the death of *John Gibson* his widow, *Elizabeth Gibson*, continued up to the time of her death, without interruption, to receive relief from that parish, and the sum of 2s. 6d. was paid weekly by it during that period for such relief.

On the 4th *February*, 1863, the parish of *Sculcoates* paid to the parish of *St. Mary, Islington*, 7l. 5s., being the whole of the charges and expenses incurred by the latter parish in the relief of the paupers up to the date of the death of *John Gibson*, but refused to pay the further sum demanded by that parish for the charges and expenses incurred in the weekly relief of *Elizabeth Gibson* from the 13th *June*, 1862, when the period of her irremovability as widow under stat. 9 & 10 *Vict. c. 66.* expired.

From the 4th *February*, 1863, until the death of *Elizabeth Gibson*, accounts and statements of the charges and expenses incurred in the weekly relief of *Elizabeth Gibson* were regularly delivered quarterly to the parish

of *Sculcoates*, and payment of the amounts thereof respectively was always, at the time of the delivery of the several accounts to that parish, demanded by the parish of *St. Mary, Islington*, as due for the relief given to *Elizabeth Gibson*.

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Payment of the accounts and charges respectively has always been refused by the parish of *Sculcoates*, and that parish has never paid anything for the relief or maintenance of *Elizabeth Gibson* since the death of her husband, but no complaint of nonpayment of any of the accounts or charges or expenses incurred for her relief or maintenance was made to the justices, nor was any application for an order for payment of any part thereof made till the 30th *May*, 1867, when the order appealed against was applied for and obtained.

The parish of *St. Mary, Islington*, have not charged the parish of *Sculcoates* with the expenses incurred in the relief or maintenance of *Elizabeth Gibson* between the date of *John Gibson's* death and the 13th *June*, 1862, nor with any of the expenses incurred in maintaining or relieving her after the 25th *March*, 1866, when she became irremovable from the parish of *St. Mary, Islington*, and the sum of 24*l.* 12*s.* 6*d.* mentioned in the order of the 30th *May*, 1867, is solely composed of the weekly payments made by the parish of *St. Mary, Islington*, between the 13th *June*, 1862, and the 25th *March*, 1866.

The question for the opinion of this Court was, whether the justices were right in making the order of the 30th *May*, 1867, upon the parish of *Sculcoates*, for the payment of the charges incurred in the relief of *Elizabeth Gibson* from the 13th *June*, 1862, to the 25th *March*, 1866.

1868. Stat. 35 *G. 3. c. 101. s. 2.* enacts "That in case any
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 poor person shall from henceforth be brought before any
 justice or justices of the peace, for the purpose of being
 removed from the place where he or she is inhabiting
 or sojourning, by virtue of any order of removal, . . .
 and it shall appear to the said justice or justices that
 such poor person is unable to travel, by reason of sick-
 ness or other infirmity, or that it would be dangerous
 for him or her so to do, the justice or justices making
 such order of removal, . . . are hereby required and
 authorized to suspend the execution of the same until
 they are satisfied that it may safely be executed, with-
 out danger to any person who is the subject thereof;
 which suspension of, and subsequent permission to
 execute the same, shall be respectively indorsed on the
 said order of removal, . . . and signed by such justice
 or justices: and no act done by any such poor person
 continuing to reside in any parish, township, or place,
 under the suspension of any such order, shall be effec-
 tual, either in the whole or in part, for the purpose of
 giving him or her a settlement in the same; and the
 charges proved upon oath to have been incurred by such
 suspension of any order of removal may, by the said
 justices, be directed to be paid by the churchwardens
 and overseers of the parish or place to which such poor
 person is ordered to be removed, in case any removal
 shall take place, or in case of the death of such poor
 person before the execution of such order;" with power
 to a justice to issue a warrant to levy the amount by
 distress and sale: Provided, that if the sum ordered to
 be paid exceed 20*l.*, the parties aggrieved may appeal
 to the Quarter Sessions, &c.; and if amended the order

is to be carried into execution by the justices by whom it was originally made.

Stat. 49 *G. 3. c. 124. s. 1.*, after reciting stat. 35 *G. 3. c. 101. s. 2.*, enacts that, in all cases where the execution of any order of removal shall be suspended, any other justice of the county or place within which such removal shall be made may direct and order the same to be executed, &c.

Sect. 3. "And, in order to avoid any pretence for forcibly separating husband and wife, or other persons nearly connected with or related to each other, and who are living together as one family at the time of any order of removal made . . . , during the dangerous sickness or other infirmity of any one or more of such family, on whose account the execution of such order of removal . . . is suspended ; be it further enacted and declared, That where any order of removal . . . shall be suspended by virtue of this or of the said recited Act, on account of the dangerous sickness or other infirmity of any person or persons thereby directed to be removed . . . , the execution of such order of removal . . . shall also be suspended for the same period with respect to every other person named therein, who was actually of the same household or family of such sick or infirm person or persons at the time of such order of removal made"

Poland, for the respondents.—First. The order of removal, which was originally suspended under stat. 35 *G. 3. c. 101. s. 2.* on account of the illness of the husband, continued suspended by virtue of stat. 49 *G. 3. c. 124. s. 3.* on account of the illness of his widow. The latter statute was passed to prevent the separation of

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members of a family ; and, contemplating the possibility that one might recover and another become ill, provided that there should be no removal during the illness of the latter. There was no period at which the order could be safely executed, while the widow continued removable. If it be said that when her husband died the respondents should have got a fresh order of removal and a suspension of it, the answer is, that would have been a useless step, as it was clear that the justices would not make the order ; *Reg. v. The Inhabitants of Llanllechid (a)*.

Secondly. No order for payment of the charges incurred by the suspension of an order of removal can be obtained until the happening of one of the two events mentioned in stat. 35 *G. 3. c. 101. s. 2.*, viz., the removal or death of the pauper. In the present case the death of the widow is for the purposes of the statute the death of the pauper. The respondents however claim only the charges incurred from the 13th *June*, 1862, till the 25th *March*, 1866. [*Hayes J.* If the widow had lived for twenty years the respondent parish, independently of the law as to the status of irremovability, would have been bound to maintain her.] In doing so it would have been only advancing money on account of the appellant parish. By stat. 9 & 10 *Vict. c. 66. s. 2.* the widow was irremovable for twelve calendar months next after the death of her husband ; but that enactment does not provide for a suspended order, and therefore the respondents do not claim repayment of the charges incurred in relieving her during that year. Nor do they claim the charges incurred after she became absolutely irremovable. Stat. 28 & 29 *Vict. c. 79. s. 8.*, by which

(a) 2 *E. & E.* 530.

residence in a parish for one year without relief confers a status of irremovability, does not alter the previous settlement of the widow ; nor does it make the charges incurred by the suspension of the order before the passing of the statute a lawful charge on the respondent parish. In *Rex v. The Inhabitants of Chagford* (a) it was decided that where a pauper during the suspension of an order became irremovable in consequence of an estate descending to him, the case was not within stat. 35 G. 3. c. 101. s. 2.; but the statute would apply if the estate was taken away from him by a Chancery suit, and he died.

Lastly. This order was obtained within six months from the time when the matter of complaint arose, as required by stat. 11 & 12 Vict. c. 43. s. 11. Stat. 35 G. 3. c. 101. s. 2. does not make the charges recoverable weekly, monthly, or quarterly, but on the death of the widow : therefore the respondent parish had no matter of complaint, and the liability of the appellant parish did not arise until that event. Under stat. 14 & 15 Vict. c. 105. s. 8. the appellant parish might have paid to the respondent parish money on account from time to time during the suspension of the order, which supports the argument that the charges incurred by the suspension of the order are an advance of money on behalf of the parish of settlement.

Digby, for the appellants.—First. The suspension of the order, by reason of the illness of the husband, affected the wife for the same period only as the husband, and became exhausted on his death. Stat. 35 G. 3. c. 101. s. 2. enacts that the charges incurred by

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(a) 4 B. & A. 235.

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“such suspension” shall be paid, that is, the suspension by reason of the illness of the husband; and the words “without danger to any person who is the subject thereof” mean any person named in the order on account of whose illness the order was suspended. At the time of making the order there was no power to suspend it in respect of any other persons mentioned in it who might become ill. [*Lush J. Stat. 49 G. 3. c. 124. s. 1.* assumes that, on the recovery of the pauper on whose account the order was suspended, another order, giving permission to execute it, is necessary; therefore the suspension remains until that order is made. Suppose, on the recovery of the husband, application were made to justices to order the execution of the original order, the illness of the wife would be a good ground for refusing to do so.] The proper course was to abandon the original order, and obtain a fresh order for the removal of the widow, which might have been suspended on account of her illness; notice of this suspended order, given in pursuance of *stat. 4 & 5 W. 4. c. 76. s. 84.*, would have enabled the appellant parish to inquire into the fact of the illness of the wife. In *Reg. v. The Inhabitants of Llanllechid (a)* it was held that the execution of an order of removal could only be suspended by the justices at the time when they made the order. The respondent parish might have removed the widow, if not sick, without an order taking off the suspension. In *Rex v. The Inhabitants of Englefield (b)*, where an order of removal had been suspended on account of the illness of the father, and on his death an order was made for payment of the charges incurred

(a) 2 E. & E. 530.

(b) 13 East 317.

by the suspension, it was held no ground for quashing the last order that his widow and children were removed without any subsequent order reversing the suspension of the first order. [*Hannen J.* In note (a) to *Rex v. The Inhabitants of Englefield* (a) it is said, "The provision made for the suspension of orders of removal in the cases provided for by the Act of the 35 G. 3. c. 101. s. 2. has been well confirmed, and the true spirit of it followed up, by the declaratory section (3) of the stat. 49 G. 3. c. 124." In that case the question was mooted whether the widow and children could be removed without an order taking off the suspension of the original order, but was not decided.]

Secondly. The event upon which the order for the charges incurred by the suspension is to be made is the removal or death of the pauper, and in the former case it must be shewn that the pauper is in a state of removability at the time of the order; *Rex v. The Inhabitants of Chagford* (b), *Reg. v. The Inhabitants of Chedgrave* (c). [*Lush J.* In neither of those cases had removal or death happened; in the latter the pauper was removed illegally. *Hannen J.* It is implied in the decision of the latter case that if the pauper had been dead the costs might have been recovered.] In *The Overseers of Salford*, appts., *The Overseers of Manchester*, respts. (d), it was held that as the pauper had become irremovable under stat. 24 & 25 Vict. c. 55. s. 1. after the order of removal had been obtained, and therefore must remain with the appellants, they were liable for his maintenance. [He also cited *Hill*, appt., *Thorncroft*, respt. (e).]

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(a) 13 East 317.

(b) 4 B. & A. 235.

(c) 12 Q. B. 206. 215.

(d) 3 B. & S. 590.

(e) 3 E. & E. 257.

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Lastly. The complaint upon which this order was founded was not made within the time limited by stat. 11 & 12 *Vict. c. 43. s. 11.* On the death of the husband the respondent parish could have obtained an order for the whole of the charges to which it was entitled up to that time. [*Hayes J.* But it could not have enforced payment of them.]

LUSH J. I am of opinion that the order of Sessions ought to be affirmed. It is abundantly clear that the Legislature intended, first, that no pauper should be removed while in such a state of sickness or infirmity as to make the removal dangerous to him; and, secondly, that the members of the pauper's family should not be separated from each other, but that while one was irremovable by reason of sickness or infirmity none should be removed; and we must endeavour to interpret the words of the statute so as to carry out the manifest intention of the Legislature.

The first question is, did the suspension of the order operate only during the illness of the husband on whose account it was suspended, or did the suspension continue to operate during the illness of the wife which supervened? I have come to the conclusion that a suspension made under stat. 35 *G. 3. c. 101. s. 2.* continues in operation under stat. 49 *G. 3. c. 124. s. 3.* until every member of the family is capable of being removed without danger. Reading the earlier by the light of the later statute, which is a declaratory rather than an enacting statute, and changing the language of the earlier only to make it comprehend every member of the family, it will run thus:—"In case any poor family

shall be brought before any justices for the purpose of being removed from the place where they are inhabiting by virtue of any order, and it shall appear to the justices that any member of such poor family is unable to travel by reason of sickness or other infirmity or that it would be dangerous for him or her so to do, the justices making such order of removal are hereby required and authorized to suspend the execution of the same until they are satisfied that it may be safely executed without danger to any person who is the subject thereof." Therefore the suspension of an order of removal continues until any justices—for under stat. 49 *G. 3. c. 124. s. 1.* they need not be those who made the order—are satisfied that it may be executed without danger to the life of any of the paupers whose settlement was adjudicated upon and whose removal was ordered. Consequently here the order of suspension continued to operate after the death of the husband during the dangerous illness of the wife and until she became permanently irremovable under stat. 28 & 29 *Vict. c. 79. s. 8.* And it was not necessary to make an application to the justices on the death of the husband for another order, for it is clear both from the language of the statute and the decided cases that no subsequent order or suspension could have been made.

The next question is, whether stat. 28 & 29 *Vict. c. 79. s. 8.*, which makes a pauper irremovable after one year's residence without relief in a parish, having supervened during the illness of the widow, and before she was in a condition to be removed under the order, has the effect of nullifying that order, so as to deprive the respondent parish of the power of obtaining repayment

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of the charges incurred in maintaining the pauper up to that time from the parish upon whom the order was made. I am of opinion that it has not that effect, and by so holding we shall put a meaning upon stat. 35 G. 3. c. 101. s. 2. which will be just and not at variance with the mind of the Legislature in the subsequent statute. It is curious that, though stat. 35 G. 3. c. 101. s. 2. makes the parish a debtor in respect of the moneys disbursed while the suspension of the order is in operation, the time for repayment of the money is either when the pauper is removed under the order, or when the pauper dies if no removal has taken place. It might have been supposed that the statute would have given the parish which was at the expense of maintaining the pauper the power of recovering the charges from time to time. And, again, the Legislature did not contemplate the death of the person during a state of irremovability, because there was no such thing then as a state of irremovability. I think, however, we may fairly put on the words "in case of the death of such poor person before the execution of the order" a meaning which will not effect the injustice contended for by the appellants, and may hold that the death, whether occurring after a state of irremovability has supervened or not, is the point of time at which the amount due for maintenance is recoverable. In the cases cited application for the costs was prevented because the pauper was alive. Therefore, on the death of the widow, the justices were authorised in making the order for the repayment of the charges incurred.

The answer to the last objection necessarily follows. If the parish could not have made the application while

the pauper was alive, the death of the pauper was the time when the money became payable, and the order was made within six months from that time.

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HANNEN J. concurred.

HAYES J. I have had doubts, but upon the whole I think the Court has come to the right conclusion. The provision in stat. 14 & 15 *Vict. c. 105. s. 8.*, enabling the parish of settlement to pay money on account, shews that the Legislature contemplated the charges as an absolute debt, and one not to be defeated by any future occurrence, such as temporary or permanent irremovability; and that is consistent with justice. The original order directed the removal of the wife as well as the husband, and stat. 49 *G. 3. c. 124. s. 3.* prevents the execution of the order in the case of the illness of any one named in it. Therefore, if the respondent parish had applied for an order of justices at the expiration of the temporary irremovability of the widow for one year from her husband's death, they could not have granted it.

Order of Sessions confirmed.

In the matter of a Complaint between ELSTONE
against ROSE.

Thursday,
November 12th

[Reported ante, p. 509.]

1868.

Monday,
November 23rd.

*Local Govern-
ment Act,
1858, 21 & 22
Vict. c. 98.
ss. 12. 13. 14.
Place having
a known or
defined boun-
dary.
Less place in-
cluded within
greater.*

The QUEEN against The Right Honourable
GATHORNE HARDY.

The Local Government Act, 1858, 21 & 22 *Vict. c. 98. s. 14.*, enacts, "In cases where any place hereby authorized to adopt this Act includes within its limits any less place which, if it were not so included, would of itself be authorized to adopt this Act, such less place shall not be entitled to adopt this Act unless the greater place within the limits of which it is included has refused to adopt the same, or unless it has been determined by one of Her Majesty's principal Secretaries of State, in manner hereinafter mentioned, that such less place ought, as respects the adoption of this Act, to be excluded from the limits of such greater place." The parish of *L.*, containing 1400 acres, comprised the corporate borough of *L.*, containing 100 acres. By stat. 2 & 3 *W. 4. c. 64. s. 35.* Schedule (O) 14, the borough of *L.*, as to the election of members to serve in Parliament, included the parish of *L.* and part of another parish. The parish of *L.* adopted The Local Government Act, 1858, and, on appeal by some of the inhabitants of the borough under sect. 17 to the Secretary of State, he ordered that the Act should be in force in the parish.

1. Held that the parliamentary borough of *L.* was not a place authorized to adopt the Act within sect. 14 of stat. 21 & 22 *Vict. c. 98.*, and that the parish of *L.*, though including the corporate borough of *L.*, was so authorized, and therefore the order of the Secretary of State was valid.

2. Per *Cockburn C. J.* Where a borough is not co-extensive with a parish, the portion of the parish without the borough is not a place having a known or defined boundary within stat. 21 & 22 *Vict. c. 98. s. 13.*

IN *Trinity Term, June 10,*

W. H. Grove, a resident ratepayer of that part of the parish of *Lymington*, in the county of *Hants*, which is situate within the tything of *Lymington*, obtained a rule, calling upon the Right Honourable *Gathorne Hardy*, the Secretary of State for the Home Department, to shew cause why a writ of certiorari should not issue to remove into this Court an order made by the late Secretary of State for the Home Department, on the 14th *December, 1866*, by which it was ordered that, The Local Government Act, 1858, 21 & 22 *Vict. c. 98.*, having been duly adopted

within the parish of *Lymington*, in the county of *Hants*, should have the force of law within that parish from and after the 31st *December* then next.

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The parish of *Lymington* is in extent about 1400 acres, and comprises within its area the corporate borough of *Lymington*, which is in extent about 100 acres, and is mentioned in stat. 5 & 6 *W.* 4. c. 76. sched. (B.), section 2. The town council of the borough had not adopted The Local Government Act, 1858. The portion of the parish without the borough is called the tything of *Lymington*, and is a place having a known and defined boundary, being a manor of itself, and the inhabitants residing in it are separately assessed from those residing within the borough for all parliamentary taxes and the police rates. The population of the borough at the census taken in 1861 was 2416, and of the tything 1655.

On the 16th *August*, 1866, a vestry meeting was convened by the churchwardens to determine whether the parish would adopt The Local Government Act, 1858 ; and on a poll being demanded, and taken on the 11th *September* following, it was resolved to adopt the Act. Doubts having arisen whether the Act could be legally adopted by the parish, the corporate part of it not having adopted the Act by its town council as provided by sect. 12 subs. (1.), it was resolved at a public meeting of the parish, in pursuance of sect. 17, to appeal to the Secretary of State, who, however, dismissed the appeal, and made the order in question, which was duly published in the *London Gazette*.

A meeting was afterwards held, at which a Local Board was elected for the parish of *Lymington* in pursuance of sect. 24 subs. (3.).

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In *Trinity* Term, 1867, a rule nisi for an information in the nature of a quo warranto was obtained against the Local Board; but it was discharged in *Michaelmas* Term following (a).

[*Saturday*,
November 23rd,
1867.]

(a) The QUEEN against STAPLES and others.

Quo warranto.
Local Board
of Health.
11 & 12 *Vict.*
c. 63. and
21 & 22 *Vict.*
c. 98.

A quo warranto information will not be granted at the instance of an individual against persons acting as a Local Board of Health constituted under The Public Health Act, 1848, 11 & 12 *Vict.* c. 63., and The Local Government Act, 1858, 21 & 22 *Vict.* c. 98.

IN *Trinity* Term, 1867,

Edward James obtained a rule for an information in the nature of a quo warranto against the defendants for acting as members of The Local Board of Health for *Lymington*, on the grounds that a Local Board could not be constituted for a parish including a borough, and that the Board was not duly constituted in regard to the proportion of members for the borough.

Hayes Serjt. and *Horace Lloyd*, shewed cause.—First. The Local Board of Health, constituted under The Public Health Act, 1848, 11 & 12 *Vict.* c. 63., and The Local Government Act, 1858, 21 & 22 *Vict.* c. 98., is a corporation, and a usurpation of its functions is a usurpation on the Crown and on Parliament. That is a misdemeanour to be proceeded against by an information filed by the Attorney General, on which, if a verdict of guilty is found there would be punishment, and not merely judgment of ouster. [They cited *Rex v. Ogden* (b), *Rex v. White* (c) per Lord Denman and Patteson JJ., *Reg. v. Taylor* (d).] In the latter case, the party applying for a quo warranto information wanted to dispute a fact which stat. 7 *W.* 4 & 1 *Vict.* c. 78. s. 49. made a condition precedent to the grant of a charter of incorporation by the Crown, alleging that it was not granted on petition of the majority of the inhabitant householders. [*Shes J.* referred to *Rex v. Saunders* (e).] Secondly. The order of the Secretary of State made under stat. 21 & 22 *Vict.* c. 98. s. 17., dismissing the appeal, is by sect. 81 “binding and conclusive” in respect of the matter to which it refers; *Ex parte Bird* (f), *Ex parte Smith* (g). Thirdly. A parish which includes a borough could adopt the Act. [The argument on this point, which was decided in the principal case, is omitted.]

(b) 10 *B.* & *C.* 230.

(d) 11 *A.* & *E.* 949.

(f) 1 *E.* & *E.* 931.

(c) 5 *A.* & *E.* 613. 618.

(e) 3 *East* 119.

(g) 1 *B.* & *S.* 412.

Stat. 2 & 3 *W.* 4. c. 64. s. 35. enacts that the several cities, boroughs, and places specified in the Schedule to the Act annexed (marked O.) shall, "as to the election of members or a member to serve in Parliament, respectively include the places and be comprised within the boundaries which in such Schedule are respectively specified and described in conjunction with the names of such cities, boroughs, and places respectively." In

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Mellish (*Griffiths* and *Trevelyan* with him), in support of the rule.—First. Where the quo warranto information would dispute the validity of the supposed charter of the Crown, and the party applying for it is one of the public, it must be filed at the instance of the Attorney General. But the fact that Local Boards are, by sect. 46 of The Sanitary Act, 1866, 29 & 30 *Vict.* c. 90., declared to be bodies corporate, does not deprive individual owners and ratepayers of the power of contesting the legality of a district formed by order of a Secretary of State. Stat. 21 & 22 *Vict.* c. 98. s. 22. requires that notice of the adoption of the Act shall be published in order to enable persons to come in and dispute the fact of the adoption. [He cited *Reg. v. Lloyd (a)*.] Secondly. The order of the Secretary of State is not conclusive. [*Mellor J.* If a corporate borough cannot legally form part of a district under stat. 21 & 22 *Vict.* c. 98. he had no power to make the order. *Cockburn C. J.* We need not trouble you on that point.] [The argument on the third point is omitted.]

COCKBURN C. J. The principle which has been laid down as to granting an information in the nature of a quo warranto in the case of a corporation under charter from the Crown applies to this, which is an analogous case. When a body, whether corporate or not, is created by the Legislature for public purposes, and the statutory powers of that body are usurped, we should require the intervention of the Attorney General. If the Secretary of State has done anything which in point of law cannot be maintained, this order should be brought up by certiorari, and we should quash it. There is no reason why we should depart from that salutary rule in favour of the present application.

MELLOR and SHEE JJ. concurred.

Rule discharged.

(a) 2 *L. T. N. S.* 232.

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Schedule (O.) 14.—County of *Hants*. Southern division, *Lymington* is specified in conjunction with “The parish of *Lymington*, and also such part of the parish of *Boldre* as is comprised within the following boundary;” &c.

The Local Government Act, 1858, 21 & 22 Vict. c. 98. s. 12. “This act may be adopted,

“(1.) In corporate boroughs to which The Public Health Act, 1848, has not been applied, by a resolution of the council assembled at a meeting held for the purpose: Provided, &c.:

“(2.) In other places under the jurisdiction of a Board of Improvement Commissioners, where all or part of the Commissioners are elected by ratepayers, or by owners and ratepayers, by a resolution of such Improvement Commissioners assembled at a meeting held for the purpose:

“(3.) In all other places having a known or defined boundary, by a resolution of the owners and ratepayers.”

Sect. 13. (1.) “Meetings for the purpose of the preceding section shall be summoned on the requisition in writing of any twenty ratepayers or owners;

“In corporate boroughs, by the mayor;

“In other places under the jurisdiction of such Improvement Commissioners as aforesaid, by the chairman of the said Commissioners;

“In places having known and defined boundaries, not being corporate boroughs, or towns under the jurisdiction of such Improvement Commissioners as are hereinbefore mentioned, by the churchwardens or one of them, or if there are no churchwardens the overseers or one of them, or if there

is none of the officers respectively above enumerated, or if such officer in any case neglects, is unable, or refuses to perform the duties hereby imposed on him, by any person appointed by one of Her Majesty's principal Secretaries of State."

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Sect. 14. "In cases where any place hereby authorized to adopt this Act includes within its limits any less place which, if it were not so included, would of itself be authorized to adopt this Act, such less place shall not be entitled to adopt this Act unless the greater place within the limits of which it is included has refused to adopt the same, or unless it has been determined by one of Her Majesty's principal Secretaries of State, in manner hereinafter mentioned, that such less place ought, as respects the adoption of this Act, to be excluded from the limits of such greater place."

Sect. 17. (1.) "In cases where a resolution adopting the Act has been passed, any number not less than one-twentieth of the owners and ratepayers of the place may present a petition to the Secretary of State appealing against the resolution, and praying that the whole or any part of such place may be excluded from the operation of the Act. And after inquiry,"

* * * *

(5.) "The said Secretary of State shall make order with respect to the matter in question on such appeal, and such order shall be binding on the place in respect of which it is made, and there shall be stated in such order the time at which this Act is to come into force."

Sect. 24. "The duty of carrying into execution this Act shall be vested in a Local Board; and such Local Board shall be,

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“(1.) In corporate boroughs, the mayor, aldermen, and burgesses acting by the council:

“(3.) In other places, such number of elective members as may be determined by a resolution of the owners and ratepayers,” &c.

The Attorney General, Sir J. B. Karlake (Archibald with him), shewed cause.—First. The order is valid. The parish of *Lymington* is a place “having a known or defined boundary” within the meaning of The Local Government Act, 1858, 21 & 22 *Vict. c. 98. s. 12. subs. (3.)*, and therefore may adopt the Act though it includes a borough corporate. The words “in all other places” exclude those previously mentioned in subs. (1.) where a parish is conterminous with a borough, and places under the jurisdiction of Improvement Commissioners mentioned in subs. (2.). The portion of a parish outside a borough is not a place “having a known or defined boundary” within the meaning of subs. (3.). The borough is a less place included within the parish, and therefore, by sect. 14, is not entitled to adopt the Act, unless the parish has refused to adopt it, or unless it has been determined by the Secretary of State that the borough ought, as respects the adoption of the Act, to be excluded from the limits of the parish. Further, the parish of *Lymington* is itself a less place included within a greater, which might adopt the Act and has not done so, for the boundaries of the parliamentary borough fixed by stat. 2 & 3 *W. 4. c. 64. Schedule (O.) 14—County of Hants*, comprise it. [He cited *Reg. v. The Ratepayers of Northowram and Clayton (a)*.] Stat. 21 & 22 *Vict. c. 98.* does not define the word “place,” but the policy of the Legislature is that the place adopting it

(a) 7 *B. & S.* 110.

should be as large an area as possible ; and, to guard against the owners and ratepayers of a larger district overpowering those of a smaller, sect. 17 gives an appeal to the Secretary of State. If the borough wishes to have a Local Board constituted under sect. 19, or has reasonable grounds for not being included in the parish, it may appeal under that section. This would be the course taken by part of a parish under the jurisdiction of Improvement Commissioners, or by a hamlet which from time immemorial had officers of its own.

Secondly. There having been an appeal to the Secretary of State, the order made by him is conclusive by virtue of sects. 21, 22, 81. And by sect. 137 of The Public Health Act, 1848, 11 & 12 *Vict.* c. 63., incorporated with stat. 21 & 22 *Vict.* c. 98. by sect. 4 of the latter Act, the certiorari is taken away. The order might be questioned in an action for levying a rate made by the Local Board, but not “after the expiration of six calendar months from the date of the constitution of the district.” Stat. 21 & 22 *Vict.* c. 98. s. 21.

Horace Lloyd appeared for the Local Board.

The applicant, in person.—Under stat. 21 & 22 *Vict.* c. 98. s. 12. subs. (1.) the Act is to be adopted in corporate boroughs by the town council without any meeting of the inhabitants. “Other places,” mentioned in subs. (2), must mean places not being corporate boroughs ; and “all other places,” mentioned in subs. (3), must mean places not before provided for and places including them. Sect. 13 (1.) mentions places having known and defined boundaries, not being corporate boroughs, and towns under the jurisdiction of Improvement Commis-

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sioners, which shews that it was intended that corporate boroughs should be the bodies to adopt the Act within their limits. Sect. 14 has no application to a corporate borough or a place under the jurisdiction of Improvement Commissioners. The policy of the Legislature in the Municipal Corporations Act, 5 & 6 *W.* 4. c. 76., and The Sanitary Act, 1866, 29 & 30 *Vict.* c. 90., was to accumulate powers in the town council. Where corporations or Commissioners have powers for sanitary purposes under a local Act they may under sect. 15 of stat. 21 & 22 *Vict.* c. 98. adopt the Act without reference to the Secretary of State; otherwise, when a corporate borough is not co-extensive with the parish, the latter will have the power of taking away from the former the right which sect. 24 subs. (1.) gives it of having the town council constituted the Local Board. That part of the parish which is without the borough is a place having a known or defined boundary, for it is a tything. [*Cockburn C. J.* In *Reg. v. The Ratepayers of Northowram and Clayton* (a) the district had been formed by the Ecclesiastical Commissioners and had a defined boundary for some purposes; but the part of the parish without the borough is not a place having a known or defined boundary for any purposes.] Then it must, under sect. 16, petition the Secretary of State to settle its boundary for the purposes of the Act. Further, the parish is itself a less place within a greater, viz., the parliamentary borough, and therefore cannot adopt the Act unless that larger place has refused to do so. The parliamentary borough is a place having known or defined boundaries.

COCKBURN C. J. The objection last taken by the

(a) 7 *B. & S.* 110.

applicant, that it was not competent for the parish to adopt The Local Government Act, 1858, because it is comprehended within the parliamentary borough, which consists of this and part of another parish, has no bearing upon the question. It might just as well be said that because it was in a county it could not adopt the Act. Stat. 2 & 3 *W.* 4. c. 64. s. 35. only enacts that, for the purpose of returning members to Parliament, the boroughs specified in Schedule (O.) shall include certain places and be comprised within certain boundaries, and for that purpose the borough of *Lymington* is more than co-extensive with the parish. But that has no bearing on the question before us. I do not quarrel with the decision in *Reg. v. The Ratepayers of Northowram and Clayton* (a); but it does not apply here.

Then comes the question whether the present case is within stat. 21 & 22 *Vict.* c. 98. It is argued that it is not within the terms of sect. 14; but, looking at the great inconvenience which would arise if a borough within a parish could prevent it from adopting the Act, we ought not to put a limited construction upon the section. As to the argument from the machinery provided in sect. 13, the answer is, that the Act, having provided in sect. 12 for corporate boroughs, and for places under the jurisdiction of Improvement Commissioners, and for places having a known or defined boundary, makes provision in sect. 13 for the mode in which the meeting for the purpose of the preceding section shall be summoned, and the three sub-sections of sect. 12 refer respectively to corporate boroughs, to places under the jurisdiction of Improvement Commissioners, and to all other places having a known or defined boundary, not being corporate

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boroughs, or places under the jurisdiction of Improvement Commissioners. But we must decide the present case by the light of the 14th section alone. When a corporate borough is included within a parish, the provisions of that section apply. If a borough proposes to insist upon its right to adopt the Act, and to keep the powers of the Act within its own more limited jurisdiction, instead of adopting it in conjunction with the rest of the parish, it must go before the Secretary of State, who will exercise a sound and wise discretion.

LUSH J. Stat. 21 & 22 *Vict. c. 98. s. 14.* in its terms comprises the present case; and the inconveniences would be great if it did not. There would be different systems of sewers, lighting, and watering, and a consequent multiplication of officers. The intention was to make the area of the district of the Local Board as large as possible.

Then it is contended that this borough does not come within the 14th section, because stat. 2 & 3 *W. 4. c. 64. s. 35. Schedule (O.)*, assigning an area to the borough for parliamentary representation, has added to it part of another parish. That does not make the parliamentary borough a larger place including within its limits a less place within the meaning of stat. 21 & 22 *Vict. c. 98. s. 14.* any more than the association of a number of parishes within a poor law union would make the whole union such a place. The boundaries of parliamentary boroughs are fixed for entirely different purposes from those of The Local Government Act, 1858.

HANNEN J. concurred.

Rule discharged, with costs.

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The QUEEN, on the prosecution of the Overseers
of GREENWICH, *against* The METROPOLITAN
Board of Works.

*Thursday,
November 25th.*

*Poor rate.
Beneficial
occupation.
Metropolitan
Board of
Works.
Sewers.
Works con-
nected with
them.
Pumping
station.*

The Metropolitan Board of Works, in pursuance of the Acts for the local management of the metropolis, constructed a system of sewers to intercept the drainage of the metropolis connected with pumping stations, by means of which the sewage is lifted up from a lower to a higher level, and ultimately discharged many miles down the *Thames*, without the limits of the metropolis. The sewers, except at the pumping stations, pass under the public highways of the metropolis or under land in which the Board have no property. The pumping stations were erected upon land the property of the Board, but are used solely as part of the main drainage and intercepting scheme. By one of the Acts power was given to them to raise money to be applied only in payment of the expenses of the works; and they were directed for the purposes of the Act to levy a rate of 3*d.* in the pound on the annual value of the whole of the property in the metropolis. All moneys raised by the rates were to be applied in payment of the sum borrowed, and the interest thereon, and towards defraying the expenses of the Board. They derive no pecuniary profit or advantage from the drainage and intercepting works, but the whole are maintained out of the funds raised in pursuance of the Acts. The Acts do not exempt them from rateability, or prohibit the application of money in their hands to the payment of parochial rates. The Board were rated to rates for the relief of the poor and for general purposes in the parish of *G.* in respect of (1) certain lengths of sewers, (2) a wharf and engine house, and (3) a pumping station with wharf, lay-by for barges, tramways, two engine houses, four steam engines, boiler house, chimney stack, two filth hoists, coal sheds and dwelling house: the whole forming part and used solely for the purposes of the main drainage and intercepting scheme. Held,

1. That the sewers were not rateable, as they were not the subject of a beneficial occupation.

2. That the other property was not exempt by reason of its being part of the drainage scheme, nor the pumping station by reason of its being an adjunct to the sewers.

UPON appeal to the *Midsummer* Quarter Sessions of the western division of the county of *Kent*, in 1866, against rates for the relief of the poor and for general purposes, made by the churchwardens and overseers of the parish of *Greenwich*, in which the appellants were

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rated in respect of certain property occupied by them, the Sessions confirmed the rate subject to a case.

In accordance with a valuation list made by the vestry of the parish, the appellants were rated as owners and occupiers of

First. "Wharf and engine house in *Norman Road*."

Second. "Pumping station, land, wharf, lay-by for barges, tramways, two engine houses, four steam engines, boiler house, chimney stack, two filth hoists, coal sheds and dwelling house in *North Pole Lane*."

Third. "Land occupied by southern high level sewer."

Fourth. "Land occupied by southern low level sewer."

Fifth. "Land occupied by southern outfall sewer."

The appellants are constituted and incorporated by The Metropolis Management Act, 1855, 18 & 19 *Vict.* c. 120., amended by The Metropolis Management Amendment Act, 1856, 19 & 20 *Vict.* c. 112., The Metropolis Management Amendment Act, 1858, 21 & 22 *Vict.* c. 104., The Metropolis Management Amendment Act, 1862, 25 & 26 *Vict.* c. 102., The Metropolis Main Drainage Extension Act, 1863, 26 & 27 *Vict.* c. 68., and stat. 28 & 29 *Vict.* c. 19., for the local management of the metropolis in respect of the sewerage and drainage, and the paving, cleansing, lighting and improvements thereof. In pursuance of the directions and under the powers given to and conferred on them by those Acts, they commenced the construction of a system of sewers to intercept the drainage of the metropolis connected with pumping stations, by means of which the sewage is lifted from a lower to a higher level, and ultimately discharged at a point many miles down the *Thames* without the limits of the metropolis.

The sewers, except at the pumping stations, pass under

the public highways of the metropolis or under land in which the appellants have, except as herein appears, no property whatever. The pumping stations are erected upon land the property of the appellants, but are used solely as part of the metropolitan main drainage and intercepting scheme.

The whole of the works, both on the northern and southern sides of the river *Thames*, are designed and intended to carry out the purposes specified and set forth in The Metropolis Management Act, 1855, The Metropolis Management Amendment Act, 1858, and The Metropolis Management Amendment Act, 1862, the principal objects being the improvement of the main drainage of the metropolis, and the purification of the *Thames* by the interception of the sewage, so as to prevent it, so far as may be practicable, from flowing into and polluting the river within the metropolis, and by the discharge of the same. All the sewers discharge themselves, by the works constructed under the above Acts, on the north side of the river at a point without the limits of the metropolis, and on the south side of the river at a point about one mile beyond the limits of the metropolis, as defined by the first mentioned Act.

The assessments were made in respect of a pumping station and certain lengths of sewers forming part of the metropolitan main drainage and intercepting scheme, and situate on the south side of the river *Thames* within the parish of *Greenwich*.

The property comprised in the first head of assessment is held by the appellants under a lease of which seven years remain unexpired; the wharf and engine house were erected for a temporary purpose as part of the metropolitan main drainage and intercepting scheme,

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and were in the occupation of the appellants before and at the time of making the rate, but are no longer used by them for any purpose whatever. The land included in this assessment was rated before the appellants took possession of it.

The property comprised in the second head of assessment is freehold property of the appellants, and consists of 3 a. 3 r. 20 p. of land, which were purchased by them for 9730*l.*, and on which have been erected engine houses and other buildings and works, part of the pumping station described in the rate, and used solely for the purposes of the main drainage and intercepting scheme. There is also a dwelling house, which consists of six rooms, in which the manager of the pumping station is compelled to live under his agreement with the appellants, and for which he pays no rent, and which, if rateable at all, is only of the rateable value of 20*l.* A portion of the land is laid out as a garden; there are also coal sheds, store rooms, workshops, tramways, turntables, cranes, and a wharf and lay-by for barges. The pumping station, with the machinery, engines, works, &c., cost about 9,400*l.* The land included in this assessment was rated before the appellants took possession of it.

The property comprised in the third head of assessment is a part of the southern high level sewer, 990 feet in length, in the parish of *Greenwich*, which for 725 feet runs under land which is not the property of the appellants, and for the remaining 265 feet under the land comprised in the second head of assessment. The total length of this sewer is 5½ miles. It commences at *Clapham*, and after running through *Clapham*, *Southwark*, *Brixton*, *Camberwell*, *Peckham*, *Hatcham* and

Deptford, terminates at the pumping station at *Greenwich*; and it drains an area of 20 square miles, including *Tooting*, *Streatham*, *Brixton*, *Dulwich*, *Camberwell*, *Peckham*, *Norwood* and *Sydenham*. This sewer is constructed of sufficient capacity to carry off all the flood waters, so as entirely to intercept them from the low and thickly populated district before mentioned, which was formerly tide-locked and subject to floods.

The property comprised in the fourth head of assessment is a part of the southern low level sewer, 230 feet in length, in the parish of *Greenwich*, which for 45 feet runs under land which is not the property of the appellants, and for the remaining 185 feet under land which is comprised in the second head of assessment. The total length of this sewer is about 10 miles. It commences at *High Street*, *Putney*, and after running through *Wandsworth*, *Battersea*, *Kennington*, *Camberwell* and *Deptford*, terminates at the pumping station at *Greenwich*; and it drains an area of about 20 square miles, including *Putney*, *Battersea*, *Lambeth*, *Newington*, *Southwark*, *Bermondsey*, *Rotherhithe* and *Deptford*, the surface of which is mostly below the level of high water, in many places 5 or 6 feet, it having at one time been completely covered by the river *Thames*. In this district the old sewers had but little fall, and except at the period of low water were tide-locked and stagnant; after long continued rain, they became overcharged, and were unable to empty themselves during the short period of low water; the waters were therefore constantly accumulating, and many days frequently elapsed after the cessation of rain before the old sewers could be entirely relieved, the sewage in the interim being forced into the basements and cellars of the houses. These defects contributed to render the district most unhealthy,

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but the construction of the low level sewer has rendered the district as dry and free from disease as any portion of the metropolis.

The property comprised in the fifth head of assessment is a part of the southern outfall sewer, 11,072 feet in length, in the parish of *Greenwich*, which runs under land which is not the property of the appellants. This sewer is about $7\frac{1}{4}$ miles in length. It commences at the pumping station at *Greenwich*, where it receives the sewage brought there by the high and low level sewers, and terminates at the river *Thames* at *Erith*. The sewage from the low level sewer has to be pumped up from a depth of 18 feet, such sewer being about that depth below the level of the bottom of the outfall sewer. The whole of the sewage of the south side of the *Thames* passes through the pumping station into this outfall sewer.

The whole of the property comprised in the assessments is held, occupied and used by the appellants in the manner and for the purposes set forth, and not otherwise.

The late Commissioners of Sewers were never rated to the relief of the poor in respect of the sewers or works connected therewith, and the appellants have never hitherto been rated in respect of the sewers, but they have been rated in the parish of *Greenwich* for a wharf, engine house and pumping station connected with the sewers.

The appellants do not derive any profit or advantage from the drainage and intercepting works, except as before stated, but the whole of the works are maintained out of the funds raised in pursuance of the Acts, and are carried on for the purposes specified and set forth in them.

By stat. 28 & 29 *Vict. c. cxxi.*, which received the Royal assent on the 19th *June*, 1865, power was given to a Company, under and subject to the provisions of that Act, to utilize the sewage collected in the main outfall sewers on the northern side of the *Thames*; and by sect. 115 the benefit of a certain agreement, a copy of which is set out in the schedule of the Act, and all obligations and engagements undertaken thereby, were transferred to the Company; and it was provided that after certain payments, therein specified, had been made, the Metropolitan Board of Works should receive a certain share of the net profits of the Company, but no money was to be received from them until the expiration of four years from the passing of the Act, and any money thereafter to be received by the Board was to be applied generally in aid of the rates of the metropolis. The works authorized by the Act are unfinished; only about two miles out of about thirty-six having been completed. No profit has hitherto been made by the utilization of the sewage by any one, and no money has been received from the Company by the appellants.

The sum of 3,000,000*l.* (the repayment of which has been duly guaranteed by the Treasury) is now due and owing by the appellants for principal moneys borrowed under the Acts, and expended on the Metropolitan Main Drainage and Intercepting Scheme, and no works of the character set forth above have been executed except with the money borrowed under the Acts.

The respondents contended that the property of the appellants was liable to be rated for the relief of the poor of the parish of *Greenwich*, and for general purposes within it, under sect. 20 of the local Act for that parish, 9 *G. 4. c. xliii.*, which enacts, "That once

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in every year, or oftener, it shall be lawful for the said churchwardens, overseers, and parishioners, assembled at a vestry meeting, to make rates upon all persons who shall occupy, hold, or use any houses, buildings, lands, tenements, or hereditaments, or possess any rateable property within the said parish; that is to say, one rate for defraying the expences of maintaining and employing the poor of the said parish, and all other expenses relating thereto, and one other rate upon the annual rent or value of such houses, &c. for the maintaining of the highways and cleansing the streets within the said parish," &c.

The appellants contended that they did not hold, occupy, or use the houses, buildings, lands, tenements, or hereditaments specified in the assessments, so as to be liable to be rated to the relief of the poor under stat. 9 G. 4. c. xliii., nor did they possess any rateable property within the parish of *Greenwich*.

The Court was to have power to draw any inferences of fact, and to amend the rate.

The question for the decision of the Court was, Whether the appellants were rateable to the relief of the poor, and to the general rate of the parish of *Greenwich*, in respect of the premises specified in the assessments, or any of them.

The Metropolis Management Act, 1855, 18 & 19 *Vict.* c. 120. s. 135., enacts: "The sewers mentioned in Schedule (D.) to this Act, being the main sewers, vested in the Commissioners of Sewers for the city of *London* and in the Metropolitan Commissioners of Sewers respectively, with the walls, defences, banks, outlets, sluices, flaps, penstocks, gullies, grates, works, and things thereunto belonging, and the materials thereof,

with all rights of way and passage used and enjoyed by such Commissioners respectively over and to such sewers, works, and things, and all other rights concerning or incident to such sewers, works, and things, shall be vested in the Metropolitan Board of Works, and such Board shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river *Thames* in or near the metropolis, and shall cause such sewers and works to be completed on or before the 31st day of *December*, 1860, and shall also make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under this Act, as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis, and shall discontinue, close up, or destroy such sewers for the time being vested in them under this Act as they may deem unnecessary, and such Board shall from time to time repair and maintain the sewers so vested in them, or such of them as may not be discontinued, closed up, or destroyed as aforesaid; and for the purposes aforesaid such Board shall have full power and authority to carry any such sewers or works through, across, or under any turnpike road, or any street or place laid out as or intended for a street, as well beyond as within the limits of the metropolis, or through or under any cellar or vault under the carriage way or pavement of any street, and into, through, or under any lands whatsoever within or beyond the said limits, making compensation for any damage done thereby, as hereinafter provided, and all sewers and works from time to time made by the said Board shall vest in them; and the said Board shall

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cause the sewers vested in them to be constructed, covered and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied, and for the purpose of clearing, cleansing, and emptying the same they may construct and place, either above or under ground, such reservoirs, sluices, engines, and other works as may be necessary, and may cause the sewage and refuse from such sewers to be sold or disposed of as they may see fit, but so as not to create a nuisance, and the money arising thereby shall be applied towards defraying the expenses of such Board."

The Metropolis Management Amendment Act, 1858, 21 & 22 *Vict. c. 104. s. 1.*, enacts: "The Metropolitan Board shall cause to be commenced as soon as may be after the passing of this Act, and to be carried on and completed with all convenient speed according to such plan as to them may seem proper, the necessary sewers and works for the improvement of the main drainage of the metropolis, and for preventing, as far as may be practicable, the sewage of the metropolis from passing into the river *Thames* within the metropolis."

By sect. 4 power is given to the Metropolitan Board to borrow a sum of money not exceeding 3,000,000*l.*, which, by sect. 6, is to be guaranteed by the Treasury, and, by sect. 8, is to be applied only in payment of the expenses of the works executed under the Act.

By sect. 10 "the Metropolitan Board shall, during forty years from the passing of this Act, assess and cause to be raised in each year upon the city of *London* and the other parts of the metropolis for the purposes of this Act such sums of money as in their judgment will be equivalent to a rate of 3*d.* in the

pound upon the annual value of the property in the said city and other parts respectively," &c. This rate, by sect. 11, is to be called "the Metropolis Main Drainage Rate."

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Sect. 12. "For the purposes of the assessments under this Act, all the parts of the metropolis shall be deemed to be equally benefited by the expenditure under this Act."

Sect. 18. "An account shall be opened in the books of the Governor and Company of the Bank of *England* for the purposes of this Act, in the names of such officers or persons as the Commissioners of Her Majesty's Treasury may direct, and such account shall be deemed a public account, and all moneys payable under the precepts of the Metropolitan Board of Works in respect of the metropolis main drainage rate shall be paid into the Bank of *England* to such account, and the dividends and income arising from the investments of any such moneys under this Act, and the produce of the sale from time to time of such investments, and all moneys borrowed for repayment, until applied for that purpose, shall be paid into the Bank of *England* to the said account."

Sect. 19. "All moneys paid to the credit of the said account shall be from time to time applied in payment of the interest of the moneys borrowed under this Act, and subject thereto in or towards payment of any moneys so borrowed which for the time being may be payable, or the purchase of bonds, debentures, or securities, whereby any such moneys are secured, for the purpose of the extinction thereof; and any surplus, after answering the purposes aforesaid, shall be invested in government securities in such manner as the Commissioners of the Treasury may think fit and direct,

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and such investments shall be sold when and as the said Commissioners may direct."

Sect. 22. "If the amount raisable under this Act shall have been raised and paid off by means of the rates levied under this Act before the expiration of the said period of forty years, the Metropolitan Board of Works, with the consent of the Commissioners of Her Majesty's Treasury, shall discontinue the assessment for 'the metropolis main drainage rate'; and any surplus of the moneys arising from the rates levied under this Act which may remain after such payment shall be applicable towards defraying the expenses of the said Board."

By The Metropolitan Main Drainage Extension Act, 1863, 26 & 27 *Vict. c. 68. ss. 2. 3.*, the Metropolitan Board of Works is empowered to borrow, with the consent and in manner provided by and subject to the conditions contained in the last mentioned Act, any sum of money not exceeding in the whole 120,000*l.*, in addition to the sums by that Act authorized to be borrowed; and by stat. 28 & 29 *Vict. c. 19.* the time for borrowing is extended to the 31st of *December*, 1867.

The case was argued *November 11*: before COCKBURN C. J., LUSH, HANNEN and HAYES JJ.

Keane, Barrow and Poland, for the respondents.—The statutes in execution of which the appellants act contain no words exempting them from liability to parochial rates; and therefore, according to the principles laid down in *The Mersey Docks and Harbour Board Trustees v. Cameron*, and *Jones v. The Mersey Docks and Harbour Board Trustees* (a), followed by *The Commissioners of the Leith Harbour and Docks*, appts.,

(a) 11 *H. L. C.* 443.

The Inspector of the Poor et al., respts. (a), the only question is whether they have a beneficial occupation of the sewers and other works. In *Rex v. The Overseers of Sculcoates* (b) Commissioners under a Drainage Act were held not rateable, because no benefit was derived in the parish in which the buildings erected by them were situated. Lord *Ellenborough* said, p. 44, "In all these cases the property rated yielded pecuniary benefit, or that which was capable of being estimated and converted into pecuniary benefit within the parish to the parties interested: but here the benefit results to the lands drained which lie in other parishes." In *Rex v. The Inhabitants of Kentmere* (c), where a local Act authorised Commissioners to form reservoirs on the river *Kent* for the purpose of affording a more regular supply of water to the mills on its banks, and by means thereof cleansing the stream and improving the health of those resident on its banks, and to levy a water rate on all mills using the water, for the purpose of maintaining the reservoirs, it was held that the Commissioners had a beneficial occupation of a reservoir which they had made in the parish of *Kentmere*. In *Reg. v. The Justices of Hull* (d) the Local Board of *Hull*, who, by The Public Health Act, 1848, 11 & 12 *Vict.* c. 63. s. 117., are made surveyors of highways, were held rateable in respect of a yard occupied by them for the purposes of repairing the highways in the district, which yard was in a parish partly without the limits of the district of the Board, on the ground that their occupation was as trustees, not for the public at large, but for the inhabitants of the district for which they acted. In *Reg. v. Badcock and*

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(a) *L. R.* 1 *Scotch App.* 17.(b) 12 *East* 40.(c) 17 *Q. B.* 551.(d) 4 *E. & B.* 29.

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others, Trustees of Taunton Market (a), Lord Denman said, p. 798, "To make rateability there must be occupation beneficial in its nature, that is, of a subject-matter producing a valuable return, though not necessarily profitable in any given year on a balance struck of profit and loss." [They also cited *The Governor &c. of the Bristol Poor v. Wait (b)*, *Reg. v. The Guardians of Wallingford Union (c)*.] It is no ground of exemption that the appellants derive no benefit themselves from the sewers and that the property vested in them is dedicated to public purposes; *Greig*, appt., *The University of Edinburgh*, respts. (d), per Lord Cairns C. [Cockburn C. J. In that case it was held, first, that the buildings of the University were not used for Crown purposes; and secondly, that as fees were received from the students, and the buildings were apart from that fact capable of a beneficial occupation, the University was rateable in respect of them. The Acts of Parliament have imposed upon the appellants the duty of constructing and maintaining sewers for the public benefit, and in order to enable them to discharge that duty have empowered them to tax the public.] The benefit accrues to a limited portion only of the public, viz., the householders who drain their sewage into the sewers. The appellants occupy land by a tunnel into which sewage is collected; and this occupation is similar to that which water and gas Companies have of land by means of their pipes. [*Lush J.* Those Companies are a trading speculation. The appellants act in performance of a public duty. *Cockburn C. J.* In *Greig*, appt., *The University of Edinburgh*, respts. (d),

(a) 6 Q. B. 787.

(b) 5 A. & E. 1.

(c) 10 A. & E. 259.

(d) L. R. 1 Scotch App. 348. 350-1.

Lord *Westbury* seems to point to a case like the present where he says, pp. 354-5, "But there may be another ground of non-liability, namely, where the property has no rateable value. Now, I do not mean by anything that I say on this occasion to prejudice at all the proper consideration of that question. For it may possibly be held that if property is occupied by persons for a purpose yielding no value at all, and they are absolutely prohibited from using it in any manner that would be productive of value, it may, I say, possibly be held that there is no rateable value in that property; and that, in that sense, therefore, it ought not to be assessed to the poor rate." There is no possibility of the appellants having a surplus for their own benefit or that of any other persons. Their right to levy rates is only commensurate with the expenses of the sewers.] That argument might have been used in *Reg. v. The Guardians of Wallingford Union* (a). [*Cockburn* C. J. There the workhouse was capable of being used as a dwelling.] In *The Mersey Docks Cases* (b) the moneys received by the trustees were not applicable only to the maintenance of the docks. *Lush* J. And the occupation of them was a source of profit; that is not so here. *Cockburn* C. J. What would the hypothetical tenant give?] He would give the aggregate amount of the rate less the expense of collection. [*Lush* J. He could not use the sewers in any other way than they are now used, and could only collect a rate which he must expend upon the maintenance of the sewers, and therefore would receive no profit. *Cockburn* C. J. It might as well be said that a street within the district of a Local Board is rateable because they can levy a rate to keep it in

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(a) 10 A. & E. 259.

(b) 11 H. L. C. 443.

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repair.] There is no occupation of a street. The public have only an easement over the soil the freehold of which is in private individuals. By stat. 3 G. 4. c. 126. s. 51. the tolls taken and the toll house erected on a turnpike road are expressly exempted from liability to poor's rates as well as any other public or parochial levy whatsoever. If an individual residing in a house in one parish occupied land in an adjoining parish for the purpose of its receiving the sewage from his house, he would have a beneficial occupation of it in respect of which he would be rateable. The operations of the appellants are the result of a combination of the inhabitants of the Metropolis to get rid of their sewage. [*Cockburn C. J.* The Legislature have authorized those operations with a view to sanitary purposes and have said that no profit shall be made out of them.]

At all events the appellants are rateable in respect of the wharf and engine house, and the pumping station and other property occupied by them.

Mellish, Raymond and Biron, for the appellants.—First. The idea of rating sewers is an entire novelty. Commissioners of sewers have existed at least from the time of the Statute of Sewers, 23 H. 8. c. 5., and have never been rated. The property in the sewers is vested in the appellants for the public benefit, and they derive no profit from it. They are empowered to levy a rate for the maintenance of the sewers and for the repayment of the money which they borrowed in order to construct them; but the money arising from the taxation of the inhabitants of the metropolis for those purposes is not a rateable profit any more than the

general taxation of the country. It might as well be contended that the appellants are rateable in respect of the *Thames Embankment*, for the construction of which they were empowered to levy a rate, or the new street recently formed to the *Mansion House*. A beneficial occupation is essential as the foundation of the poor rate, and there must be a profit derived by the occupier from the occupation, though he may have to disburse it for the benefit of other persons. In *The Mayor, &c., of Lincoln*, appts., *The Overseers of Holmes Common*, respts. (a), it was held that the corporation of *Lincoln*, who, as lords of the manor, were occupiers of the soil of a common subject to the rights of profit à prendre in the freemen which exhausted the profits of it, had no beneficial occupation and therefore were not liable to be rated, and that the case did not come within the principle of *The Mersey Docks and Harbour Board Trustees v. Cameron and Jones v. The Mersey Docks and Harbour Board Trustees* (b). Rates per se are not rateable on the same principle that tolls per se are not rateable. [They also cited *Lord Bute v. Grindall* (c).] [Mellor J. In *The Mersey Docks Cases* (b) Lord Cranworth said, p. 507, "If by *beneficial* occupation is meant any occupation of something valuable, something in its own nature *beneficial* to some one, I think it is fair to consider that word as impliedly included in the statute" 43 *El. c. 2*. "It was not meant to impose the duty of contributing to the relief of the poor, on any one merely because he might be the occupier of a barren rock, neither yielding, nor capable of yielding, any profit from its occupation."] The tolls levied in *The Mersey Docks*

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(a) 8 B. & S. 344.

(b) 11 H. L. C. 443.

(c) 1 T. R. 338.

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Cases (a) could only be received so long as the docks remained fit for use. But the appellants would levy the sewers rate even if the sewers ceased to exist; and this shews that the rate is not a profit derived from the occupation of the soil. Could it be contended that the *Monument* in the city of *London* is rateable, or the *Duke of York's Monument*? A county bridge maintained out of the county rates is beneficial to the public, but it is not capable of yielding a profit, and therefore is not rateable. In *Reg. v. The Justices of Hull (b)* the yard occupied by the Local Board of Health, on whom were cast the duties of surveyors of the highways, and used by them for the purposes of repairing the highways, might have been appropriated to any other purpose. These sewers are appropriated by Act of Parliament to the purpose of carrying away the sewage of the Metropolis. In *The Mersey Docks Cases (a)* the docks were a commercial speculation carried on by the trustees, and they had a beneficial occupation, for they actually occupied land as docks, and in virtue of that occupation received payments from the shipping using the docks in excess of what was necessary to maintain them; per *Blackburn J.*, delivering the opinion of the majority of the Judges, p. 462. If the appellants sold the sewage at such a price as would leave a surplus after paying the expense of maintaining the sewers, they would be rateable in respect of the profit so obtained. Moreover they have not such an occupation of the sewers as makes them rateable under stat. 43 *El. c. 2*. In *The North London Railway Company v. The Metropolitan Board of Works (c)* Wood

(a) 11 *H. L. C.* 443.

(b) 4 *E. & B.* 29.

(c) *Johns.* 405.

V. C. held that the power given to the Board by sect. 135 of stat. 18 & 19 *Vict. c.* 120. of constructing the sewers might be exercised without purchasing the land or any easement in it.

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As to the pumping station, it is auxiliary to the sewers: also the other property occupied by the appellants is part of the entire system or scheme of drainage, and the principal subject-matter being not rateable the subordinate parts are not; *Rex v. The Overseers of Bilston (a)*. The hypothetical tenant would take the property as a whole.

Cur. adv. vult.

The judgment of the Court was now delivered by

LUSH J. There is nothing in the statutes by which the Metropolitan Board of Works are constituted, or under which they constructed and now maintain the public sewers, to exempt them from rateability for any rateable property which they occupy; nothing which, either expressly or by implication, prohibits their application of the money in their hands to the payment of parochial rates. The only question therefore is, whether the property in question is rateable.

As regards the sewers, we are of opinion that they are not rateable, on the short ground that they are not at present the subject of a beneficial occupation. No payment is made to the Board for the use of them; the rates which the Board are empowered to levy are for the expence of construction and maintenance and nothing more. Their occupation yields no profit to the Board, as occupiers, either actual or potential.

But as regards the other property, in respect of which

(a) 5 B. & C. 851.

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the Board are assessed, we are of opinion that the rate is properly imposed. The wharf and engine house in *Norman Road*, and the pumping station, land, wharf, lay by for barges, tramways, engine houses, and appurtenances in *North Pole Lane*, have an occupation value. The Board must have rented such premises if they had not become the owners of them, and a tenant might easily be found to take them if the Board were able and willing to let them.

A distinction was attempted to be drawn in favour of the pumping apparatus, as being a necessary adjunct to the sewers, and it was contended that as the sewers are not rateable, this adjunct must be exempted as being part of a non rateable subject. But we cannot accede to this view. The machinery stands on land which is valuable for occupation, and which would undoubtedly be rateable in the hands of any other occupier; and its rateable quality cannot be affected by the particular use to which it is applied by the Board. The reason why the engine and pit in *Rex v. The Overseers of Bilston* (a) were held to be exempt was, that the pit was sunk and the engine erected in, and that they formed part of, an ironstone mine, which was itself not a rateable subject. But that reason does not apply to the present case (b).

The order of sessions must therefore be confirmed as to the first and second heads of assessment, and quashed as to the residue.

Rule accordingly.

(a) 5 B. & C. 851.

(b) See *The Talargoch Mining Company*, appts., *The Guardians of the St. Asaph Union*, respts., ante, p. 210.

[1869.]

POOLE *against* WILLATS.[Saturday,
July 3rd,
1869.]

Action by indorsee against acceptor of a bill of exchange. Plea. A composition deed registered under The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134.: the deed contained no reservation of rights against sureties. Replication. That the bill was accepted for value and indorsed to the plaintiff for value, and that if he had assented to the deed he would have discharged the drawers. Rejoinder. That before the registration of the deed the drawers consented to the plaintiff executing and becoming bound by the deed. The issue upon the rejoinder having been found for the defendant, Held that, as by reason of such consent the plaintiff might have come in for the composition and have held the drawers liable for the balance, he was in the same position as if the right to have recourse to the drawers had been reserved to him in the deed, and therefore was bound by it.

Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. Composition deed. Reservation of rights against sureties. Assent by surety to execution of deed.

THIS was an action by an indorsee against the acceptor of a bill of exchange, to which the defendant pleaded a composition deed registered under sect. 192 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. The deed which was set out in the plea did not contain a clause reserving the rights of creditors against sureties.

The plaintiff replied that the bill was accepted for value and indorsed to him for value, and that if he had assented to the deed, he would have discharged the drawers.

To this there was a rejoinder, alleging that before the registration of the deed, the drawers consented to the plaintiff executing and becoming bound by the deed.

On the trial, before Cockburn C. J., at the London Sittings, after Trinity Term, 1867, the jury found the issue joined upon the allegation in the rejoinder in favour of the defendant.

In Michaelmas Term following, a rule was obtained to enter judgment for the plaintiff non obstante veredicto on the ground that as the deed did not reserve his right against the drawers, he was not on equal terms with the

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other creditors, and that the consent of the sureties to the composition did not remove the inequality.

In *Michaelmas* Term, November 23rd, 1868, before COCKBURN C. J., LUSH and HANNEN JJ.

Pearce shewed cause, and

Murphy supported the rule, citing *Johnson v. Barratt* (a), *Oldis v. Armston* (b), *Keyes v. Elkins* (c), *Hidson v. Barclay*, in error (d) per *Blackburn J.*, *Hart v. Smith* (e).

Cur. adv. vult.

LUSH J. now delivered the judgment of the Court.— (After stating the substance of the pleadings, the finding of the jury, and the rule nisi.) We think the argument for the plaintiff cannot prevail. It has been held that a composition deed is not necessarily invalid, for not containing a reservation against sureties, because it cannot be assumed that there are any creditors with sureties; *Johnson v. Barratt* (a.) That is a fact which must be shewn by averment. Here, the fact that the plaintiff was such a creditor is shewn by the replication, and were it not for the rejoinder, that would vitiate the deed, because if he had executed it without the consent of the drawers of the bill, he would have discharged them, and would thus have been in a worse position than the other creditors who must be supposed to have had no remedy over for the balance of their debts. But the rejoinder we think removes this objection, and leaves the deed as it would have been if this fact had not appeared.

(a) 4 H. & C. 16.

(b) 36 L. J. Exch. 181; L. R. 2 Exch. 406.

(c) 5 B. & S. 240.

(d) 3 H. & C. 361. 369.

(e) Ante, p. 543, pl. 2.

A deed under the statute has no operation against non-assenting creditors until it is registered. If, at that date, the plaintiff would have been unable to come in with the rest of the creditors without forfeiting his security, he would not have been bound by the deed, and no subsequent act or assent would have bound him. But as, at the time of registration, the consent of the drawers had been given, and he might have come in for the composition, and have held them liable for the balance, he was in precisely the same position as if the right to have recourse to the drawers had been reserved to him in the deed. The case of *Ordish v. Armston* (a) is the converse of the present case. There the deed in terms bound the creditors to indemnify the debtor against any bills or notes he might have given them on account of their debts, and was therefore bad on the face of it, and the Court held that it was not made good by an averment that at the time of registration there were no creditors, to whom any bills or notes had been given, other than those who had assented to the deed; for creditors were not bound to look beyond the deed, and, being bad on the face of it, no averment could make it good. In the present case the deed is good on the face of it. We cannot assume that there were any creditors with sureties other than the plaintiff, and since the extrinsic fact, which would have vitiated the deed, as regards him, is met by the rejoinder, and the *primâ facie* inequality removed, we think he is bound. We therefore discharge the rule.

Rule discharged.

(a) 36 *L. J.* 181; *L. R.* 2 *Exch.* 406.

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Tuesday,
November 24th.

In re SULLIVAN *against* PEARSON (a).

Attorney.
Lien for costs.
Action.
Compromise
after verdict.
Collusion.

1. Where a judgment or a verdict which is not disturbed has been obtained, and *semble*, where a debt is ascertained through the exertions of the attorney, and the parties make a collusive compromise, the Court will enforce the attorney's right of lien for his costs.

2. The compromise is collusive where the object of it is that the plaintiff should get more than he would in the ordinary course, while his attorney would get less.

3. An action for unliquidated damages was compromised by the parties after the plaintiff, who was a labourer, had obtained a verdict for 25*l.*, and a rule nisi for a new trial had been granted on the ground that the verdict was against the evidence. Held, that the attorney had no ground for claiming the equitable interference of the Court to enforce his right of lien.

NOV. 12. *Willis* obtained a rule calling on the plaintiff and the defendant to shew cause why they or one of them (b) should not pay to the plaintiff's attorney his costs in this action.

The action was brought to recover compensation for injuries caused to the plaintiff by the negligence of the defendant's servants. The defendant was a contractor to a District Board of Works, and the plaintiff was a labourer.

On the trial at the Sittings at *Guildhall*, after *Hilary* Term, 1868, the plaintiff obtained a verdict for 25*l.*

In *Easter* Term, a rule nisi for a new trial was granted, on the ground that the verdict was against the evidence. On the same day on which the plaintiff's attorney was served with that rule, he had delivered to the defendant's attorney a copy of his bill of costs, amounting to nearly 100*l.*, out of which he was between

(a) In the Bail Court.

(b) See *Ex parte Games. In re Williams v. Lloyd*, 3 H. & C. 294.

30*l.* and 40*l.* out of pocket. On the 10th *August*, before that rule came on for argument, the plaintiff, being out of work and in distressed circumstances, called on the defendant and asked him to settle the action. The defendant thereupon paid him 10*l.*, for which the plaintiff gave a written receipt "in settlement of the above action for personal injury and solicitor's charges in full of all demands." On the 20th, the plaintiff's attorney gave the defendant's attorney notice that he had a lien for his costs on the damages recovered in the action. On the 4th *September*, he took out a summons, calling on the defendant to pay his costs, on the ground of the defendant having fraudulently and collusively compromised the action after verdict with the plaintiff in person. The Judge declined to make any order.

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Hance (*Ballantine* Serjt. with him) now shewed cause for the defendant.—He contended, First. That as the action had not terminated in favour of the plaintiff, there was no certain fund on which his attorney's right of lien for costs could attach, and it was doubtful whether there ever would be such a fund, and that the plaintiff was dominus litis, and might compromise the action without the consent of his attorney; *Ex parte Hart, in re Tovery v. Payne* (a), *Quested v. Callis* (b), *Barker v. St. Quintin* (c), per *Parke* B. Secondly. That the compromise was not effected by fraudulent collusion between the plaintiff and the defendant to deprive the plaintiff's attorney of his costs; *Clark v. Smith* (d), per *Tindal* C. J.

Willis, in support of the rule, contended that the

(a) 1 *B. & Ad.* 660.(b) 10 *M. & W.* 18.(c) 12 *M. & W.* 441. 451.(d) 6 *M. & G.* 1051. 1053.

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plaintiff, in effecting the compromise after verdict in his favour, was dealing with his attorney's right in the subject matter of the suit; that where there is collusion the Court will interfere at any stage of the suit to protect the lien of the attorney, and that in the present case the compromise must have been made collusively for the purpose of depriving the plaintiff's attorney of his costs; *Gould v. Davis* (a), *Brunsdon v. Allard* (b), *Ex parte Games*. *In re Williams v. Lloyd* (c), 1 Arch. Pr., 137, 11th ed.

BLACKBURN J. This rule must be discharged. An attorney who has conducted a cause, and by his exertions obtained judgment for his client, is entitled to have the amount pass through his hands as security for the repayment of advances and remuneration for his labour. This lien is not equivalent to an equitable assignment to the attorney of the proceeds of the judgment; but the Court in the exercise of an equitable jurisdiction will interfere to protect it, where judgment has been obtained or the fruits of the litigation substantially acquired, and a collusive arrangement is made between the client and the opposite party to defeat it. The cases do not define what collusion for this purpose is; but to make out a case of collusion it must appear that the object of the compromise is that the plaintiff should get more than he would in the ordinary course while his attorney would get less. In *Ex parte Games*. *In re Williams v. Lloyd* (c) judgment was actually signed for costs, and collusion between the plaintiff and the defendant to

(a) 1 C. & J. 415; 1 Tyr. 380.

(b) 2 E. & E. 19.

(c) 3 H. & C. 294.

deprive the attorney of them distinctly appeared. But it is not necessary that judgment should have been signed. Where there is what may be called a clean verdict and nothing remains to be done but signing judgment, the case would be the same as if judgment had been signed. And there may be cases in which the Court would interfere where, after a debt has been ascertained and the fruits of the litigation obtained through the exertions of the attorney, an arrangement is made to prevent the attorney getting his costs. In *Gould v. Davis* (a), where the action was brought for a debt of 25*l.*, and there was an agreement between the plaintiff and the defendant to settle it without the intervention of their attorneys, on the defendant giving the plaintiff a bill of exchange for 24*l.*, 19*l.* for the debt due to the plaintiff and 5*l.* for costs, the Court ordered the bill to be delivered up to the plaintiff's attorney in satisfaction of his costs. In the present case the plaintiff, who is a pauper and cannot pay his attorney, obtained a verdict for 25*l.*, but a rule nisi for a new trial was obtained on the ground that the verdict was against the weight of the evidence. According to the ordinary practice, the Court before granting the rule would consult the Judge before whom the action was tried, and unless he had been dissatisfied with the verdict they would not, considering the small amount of the damages, have granted the rule. Therefore at the time of the compromise the litigation was in such a stage that it was very doubtful whether it would in the end be successful, and the plaintiff was still dominus litis. The litigation had not arrived at the stage when the fruits of it were ready to be gathered by the client, and

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the attorney would be deprived of his costs by a compromise. Moreover, the plaintiff wanted the money and might honestly deem the payment of 10*l.* an adequate reason for not persisting in a doubtful claim. And the defendant, being sued by a pauper, might have good reason for giving 10*l.* to be quit of the costs of making his rule absolute and of a new trial.

HAYES J. The present case goes beyond any previously decided. The action was for unliquidated damages, and the result was uncertain. It is a fallacy to say that the compromise deprived the plaintiff's attorney of his costs, for it was not certain that costs would be payable by the defendant to the plaintiff.

Rule discharged.

Friday,
November 20th.

HART and another *against* SMITH.

[Reported ante, p. 543.]

Wednesday,
November 25th.

WASON *against* WALTER.

[Reported 8 *B. & S.* 671.]

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The following notification was read in Court by one *Wednesday,*
of the Masters:— *November 4th.*

ELECTION PETITIONS (a).

“ We, the undersigned Judges of the Court of Queen’s Bench, being a majority of the Judges of the said Court, select the Hon. Mr. Justice *Blackburn* to be placed on the rota for the trial of election petitions for the ensuing year.

Dated *November 3*, 1868.

A. E. COCKBURN.

ROBT. LUSH.

JAMES HANNEN.

G. HAYES.”

(a) See The Parliamentary Elections Act, 1868, 31 & 32 *Vict. c. 125.*
s. 11. subs. 2.

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*Wednesday,
November 18th.*

MEMORANDUM.

Members of Inns of Court who had been called to the Bar this Term by the Benchers of the Inns, attended to be sworn before signing the roll.

LUSH J. said, We have considered The Promissory Oaths Act, 1868, 31 & 32 *Vict. c. 72.*, and are clearly of opinion that inasmuch as by sect. 9 the oaths of allegiance, supremacy and abjuration which were the only oaths heretofore required to be taken by barristers have been abolished, and barristers are not mentioned in the Schedule among the persons required to take the new oath of allegiance; no oath is now required to be taken by persons on being called to the Bar.

The Queen's Coroner stated that it would still be necessary for the gentlemen to sign the roll which was preserved in this Court for twenty years, and then deposited in the Record Office.

This was accordingly done; and by direction of the Court each attached to his signature the name of the Inn of Court to which he belonged.

END OF MICHAELMAS TERM.

MICHAELMAS VACATION, 32 VICT. 1868.

PHILLIPS *against* CALDECLEUGH and another.

Thursday,
November 26th.

Conditions of sale of a freehold house:—"5. The abstract of title will commence with a conveyance dated the 17th *April*, 1860, and no purchaser shall investigate or take any objection in respect of the title prior to the commencement of the abstract." 9. "If any error or misstatement shall appear to have been made in the particulars of sale," it is not to annul the sale, but shall entitle the purchaser to compensation. The abstract commenced with the deed dated the 17th *April*, 1860, which conveyed the house in fee, subject to the covenants and conditions on the part of the grantee, his heirs and assigns, in a deed dated the 2nd *March*, 1850. The purchaser required that the vendor should shew that the covenants and conditions in the deed referred to did not affect the house. The vendor answered by referring to the 5th condition of sale. Held,

*Vendor and
purchaser.
Conditions of
sale.
Objection to
title.*

1. That the purchaser was entitled to have an unincumbered freehold title shewn on the abstract of the deed of the 17th *April*, 1860, notwithstanding the 5th condition.

2. That the objection was not within the 9th condition.

THIS was an action to recover damages for the alleged nonperformance by the defendants of a contract of sale by them to the plaintiff of a freehold residence, and by consent of the parties the following case was stated for the opinion of this Court.

On the 5th *June*, 1867, the plaintiff entered into a contract with the defendants for the purchase by the plaintiff from the defendants of a house described as a freehold residence, No. 2, &c., being Lot 2 referred to in certain particulars and conditions of sale, for 600*l.*, subject to

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the conditions of sale so far as the same were applicable to a sale by private contract, and paid a deposit of 120/. Among the conditions were the following: "5. The abstract of title to the Lots 1, 2 and 3, being the freehold portion of the property, will commence with a conveyance dated the 17th *April*, 1860, and no purchaser shall investigate or take any objection in respect of the title prior to the commencement of the abstract." "6. All recitals and statements in deeds or other documents shall be conclusive evidence of the matters or things so recited or stated or thereby implied, and all attested, office or other copies, abstracts or extracts of or from any deeds, wills, proceedings in Chancery, parochial or public registers or other documents, and all evidences of deaths of parties, intestacy, partnership or other matters of pedigree or of identity of parties or parcels, and generally all documentary and other evidences called for by the purchaser shall, whether required for verification or completion of the abstract of title or delivery to the purchaser or for any other purpose, be at the expense of the purchaser requiring the same." "9. If any error or mis-statement shall appear to have been made in the particulars of sale, such error or mis-statement is not to annul the sale or entitle the purchaser to be discharged from his purchase, but a compensation is to be made to or by the purchaser as the case may be, and the amount of such compensation to be fixed by the auctioneer." There was also the usual condition that if any purchaser should fail to comply with the conditions his deposit should be forfeited and the vendor be at liberty to resell.

On the 11th *June*, 1867, the defendants delivered to

the plaintiff a document entitled "An abstract of the title of Mr. *Simon Caldcleugh* and *Thomas Duncckley* to freeholds situate and being No. 2, &c., as and for the abstract agreed to be delivered."

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The following are the material parts of the abstract :

17th *April*, 1860. By indenture made between *W. T. Riley*, *A. B. Cochrane* and *W. Pearson*, of the one part, and *E. Mathews* and *G. Beckett* of the other part.

Reciting, inter alia, an indenture dated the 2nd *March*, 1850, whereby *R. Edmonds* assigned (a) unto *E. Richards* a parcel of ground situate and being in *St. Giles, Camberwell*, in the county of *Surrey*, and also the several messuages or tenements thereon erected: To hold the same, with their appurtenances, unto the use of the said *E. Richards*, his heirs and assigns.

And reciting that *E. Richards*, being a trader within the laws relating to bankruptcy, became unable to meet his engagements with his creditors, and he thereupon on the 28th *April*, 1855, presented his petition to the Court of Bankruptcy under the provisions of The Bankrupt Laws Consolidation Act, 1849, praying that such proposal as he might be able to make, or such modification thereof as by three-fifths in number and value of his creditors might be determined, might be carried into effect under the superintendence and control of the said Court.

[Then followed recitals of the proceedings in bankruptcy.]

And reciting an indenture dated the 10th *August*, 1855, whereby *E. Richard* assigned (a) unto *W. T. Riley*, *A. B. Cochrane* and *W. Pearson*, and their heirs, all the

(a) *Sic.*

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messuages, lands and tenements of or to which he, or any person or persons in trust for him, was or were seised or entitled.

And reciting that *W. T. Riley, A. B. Cochrane* and *W. Pearson* as such trustees had contracted with *E. Mathews* and *G. Beckett* for the sale to them of the hereditaments thereafter described in fee simple, subject (so far as the same premises were subject thereto) to the covenants and conditions on the part of the grantee, his heirs and assigns, in the indenture of the 2nd *March*, 1850, and to the payment of the apportioned rentcharge in lieu of tithes (if any), but free from all other incumbrances, for the sum of 2400*l*.

It was witnessed that in pursuance of the agreement and in consideration of 2400*l*., paid in equal moieties by *E. Mathews* and *G. Beckett* to *W. T. Riley, A. B. Cochrane* and *W. Pearson* (the receipt, &c.), they the said *W. T. Riley, A. B. Cochrane* and *W. Pearson*, in execution of the trust or power for that purpose reposed in them by the indenture of the 10th of *August*, 1855, and of every other power them or any of them thereunto enabling, did, so far as they lawfully could or might, and not further or otherwise, grant and convey unto *E. Mathews* and *G. Beckett* and their heirs—[the parcels included the messuage in question]—subject to the covenants and conditions in the indenture of the 2nd *March*, 1850, contained, so far as the said firstly thereinbefore described premises were subject to the same covenants and conditions.

The abstract then abstracted certain indentures of mortgage and the will of *E. Mathews*, appointing the defendants executors, whereby he devised to the defend-

ants all his freehold estate as therein mentioned, and stated the death of *E. Mathews* on the 14th *October*, 1863, without having revoked or altered his will.

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On the 17th *June*, 1867, the plaintiff delivered to the defendants requisitions on the title, which were returned to the plaintiff by the defendants with their answers on the 21st *June*, 1867.

The following is a copy of one of the requisitions and the defendants' answer thereto:—

“The vendor must shew, notwithstanding any of the conditions of sale, that the covenants and conditions contained in an indenture dated the 2nd *March*, 1850, and referred to in the first abstracted deed, do not in any manner affect the property comprised in Lot 2, and that the purchaser incurs no liability in respect of them.”

“The purchasers' solicitors are referred to the 5th condition of sale.”

The plaintiff refused to accept the title in the abstract and complete the purchase, and the defendants thereupon resold the house by public auction.

Joshua Williams (*Steele* with him), for the plaintiff.
—The house in question was sold as freehold property; and the objection to the title is that the deed with which the abstract of title commences recites a deed containing certain covenants and conditions, and it does not appear what they are. [He was then stopped.]

Dowdeswell (*Raymond* with him), for the defendants.—
It is not competent to the purchaser to take an objection to a deed dated earlier than the commencement of the abstract. The meaning of the 5th condition of sale

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must be that the defendants sold the interest which they had in the house, as it appeared on the deed of the 17th *April*, 1860. [*Hannen J.* Then it should have been worded differently, viz., that the purchaser would take such title as the vendor had, or as the deed of the 17th *April*, 1860, disclosed. *Lush J.* Suppose the deed referred to conveyed only a moiety of the interest in the house.] The covenants and conditions in question are not contained in the deed of 17th *April*, 1860. [*Hannen J.* But they are incorporated into it by reference.] They derive force from the earlier deed. In *Spratt v. Jeffery* (a) the two leases and goodwill of a public house were sold by the defendant "as he holds the same," and the plaintiff agreed to accept an assignment "without requiring the lessor's title:" one of the leases set forth in the abstract was granted by trustees under a power, but not according to the power; and it was held in an action to recover the deposit that the plaintiff was precluded from calling in question the title of the lessor. In *Souter v. Drake* (b), which was a contract for the sale of a lease, there was no stipulation limiting the right of the purchaser to investigate the title of the lessor, nor any thing to show that he waived the question of title. In *Corrall v. Cattell* (c) the condition was that the purchaser should "not make any objection on account of the said alleged indenture;" and Lord *Abinger*, in delivering the judgment of the Court, said, p. 748, "we think that, according to the ordinary signification of these words, *every species of objection* to the title, on the part of the purchaser, arising out of the alleged deed, is interdicted, and he is there-

(a) 10 B. & C. 249.

(b) 5 B. & Ad. 992.

(c) 4 M. & W. 734.

fore precluded from insisting, either upon the existence of the deed, or upon its legal effect and operation, as a defect in the title which he has agreed to take ;—and this interpretation is perfectly consistent with every other part of the agreement, and is by no means unreasonable. The plaintiff may have been imprudent in entering into a contract whereby he may be forced to take a defective title : but he has himself only to blame, for he either knew of the supposed defect, or had the means of knowing it.” [He also cited *Hanks v. Palling* (a).] Further, the objection is to an error in description, which does not annul the sale but is the subject of compensation under the ninth condition.

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Joshua Williams was not called upon to reply.

LUSH J. It is unfortunate for the defendants that the conditions of sale are not framed so as to guard against this objection. If there had been no conditions of sale the purchaser would have been entitled to an abstract tracing back the title for forty years. The question is, to what extent do the conditions qualify this right. [His Lordship read the fifth condition.] That restricts the right of inquiry as to any conveyance prior to the 17th *April*, 1860. But the plaintiff is entitled to have an unincumbered freehold title shewn on that conveyance. The deed, when produced, shews that the house conveyed is subject to certain covenants and conditions contained in an indenture of the 2nd *March*, 1850, without intimating what they are. Those covenants and conditions may very much deteriorate the value of the property. Therefore we shall not violate

(a) 6 E. & B. 659.

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any one of the cases cited by holding that the purchaser is entitled to have a good title shewn by the deed of the 17th *April*, 1860, and that if it be not shewn he may refuse to complete the purchase. Mr. *Dowdeswell* asked in what way the condition should be framed in order to meet this objection? That question is answered by some of the cases in which the condition was that the purchaser should take the property as the vendor held it or such a title as was shewn by a particular deed. The ninth condition, which is the usual one for guarding against an error or mis-statement in description, does not apply to the existence of incumbrances, nor could they be compensated for under it, for it is not shewn what they are.

HANNEN J. Mr. *Dowdeswell* properly said that this is a question of construction, and as to what is the meaning of the parties. I am of opinion that the objection taken by the plaintiff is not within the language or meaning of the parties in the fifth condition as we must read it. The plaintiff was not seeking to investigate or take any objection to the title prior to the commencement of the abstract; but he was inquiring what was the title really conveyed by the deed of the 17th *April*, 1860. It is necessary in order that the title should be understood that the deed referred to should be seen, otherwise it cannot be known what are the covenants and conditions to which the house is subject.

Judgment for the plaintiff.

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THURLOW *against* LUMSDEN MACKESON.Thursday,
November 26th.

A mortgage of leasehold premises in 1848 contained a power to sell by public sale or private contract for such price as could reasonably be gotten, &c., and it was agreed that the receipt of the mortgagee should discharge the purchaser from being answerable for the misapplication or nonapplication, or from being bound to see to the application of the money, or from being bound or concerned to inquire into the necessity or propriety of the sale. The mortgagor having made default in payment of the mortgage money and become bankrupt, the defendant, the mortgagee, in 1852, contracted with *P.* to sell him the premises for 550*l.*, a larger sum being then due on the mortgage, and by a deed reciting that it had been agreed that 500*l.*, part of the purchase money, should remain on mortgage of the premises, the defendant in pursuance of the power contained in the mortgage deed assigned the premises to *E. M.*, subject to the rent, covenants, &c. contained in the original lease, but freed and discharged from the principal and interest secured by the mortgage, upon trust to sell in case *P.* should make default, and *P.* covenanted to pay the sum of 500*l.* by yearly instalments. The defendant credited the whole of the 550*l.* to the mortgagor; *P.* entered into possession, and having paid 200*l.* on account, made default and became bankrupt. In 1859 the defendant and *E. M.* by deed reciting, inter alia, that the defendant in pursuance of the power of sale contained in the mortgage deed of 1848, had sold to *P.*, assigned the premises to *L. M.*, with a covenant against incumbrances. *L. M.* assigned to the plaintiff. A declaration in covenant on the deed of 1859 alleged two breaches, (1). That the defendant had not sold in pursuance of the power: (2), That he had done an act whereby the premises were incumbered. Held,

1. That the covenant against incumbrances passed to the assignee; but
2. That as there was a bonâ fide contract of sale between the mortgagee and *P.* the power of sale in the original mortgage deed had been duly exercised, notwithstanding the contract was carried out by a mortgage, and therefore the right of redemption in the mortgagor was barred, and the purchaser had an unincumbered title.
3. *Quære*, whether a covenant was to be implied from the recital in the deed of 1859 that the defendant had sold in pursuance of the power?

THIS was an action of covenant on a deed of assignment dated the 14th *December*, 1859, by which, after reciting an underlease by way of mortgage of certain leasehold premises, dated the 18th *November*, 1848, to the defendant, that the defendant in pursuance of a power of sale contained therein had sold to *H. Paine*, and another underlease by way of mortgage by the defendant and *H. Paine* to *E. Mackeson*, *E. Mackeson* assigned and the defendant confirmed the premises to *L. J. Marshall*. The deed contained a covenant by the

Mortgage of leaseholds.
Power of sale.
Sale with agreement for part of purchase money to remain on mortgage.
Recital of exercise of power.
Implied covenant.
Covenant against incumbrances.
Action by assignee.

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defendant against incumbrances. The declaration alleged two breaches. First. That the defendant had not in pursuance of the power of sale contained in the deed of the 18th *November*, 1848, sold the premises to *H. Paine*. Secondly. That before making the covenant he had made, done, committed and executed, and knowingly and willingly permitted and suffered, and been party and privy to an act, deed, matter and thing, whereby and by means whereof the premises were impeached, charged, incumbered and otherwise prejudicially affected.

There was a plea denying the breaches. Also a demurrer to the first breach, which however was abandoned on the argument; two of the points were, that the recital that the defendant, in pursuance of the power of sale, had sold the premises to *H. Paine* did not amount to a covenant; and that it did not amount to such a covenant as to entitle the plaintiff as assignee to maintain the action for a breach of it.

On the trial, before *Cockburn C. J.*, at the Sittings in *Middlesex* after *Hilary* Term, 1868, a verdict was found for the plaintiff subject to the opinion of the Court on a special case.

By indenture dated the 17th *October*, 1848, and made between *R. Chambers* of the one part, and *H. H. Davis* of the other part, *R. Chambers* demised certain premises at *Battersea* to *H. H. Davis* for the term of 108 years, from the 29th *September*, 1848, subject to a yearly rent of 12*l.*

By indenture dated the 18th *November*, 1848, and made between *H. H. Davis* of the one part, and the defendant of the other part. After reciting the indenture of lease of the 17th *October*, 1848, *H. H. Davis*, in consideration of 450*l.* paid to him by the defendant, and in consideration that the defendant had agreed to

advance to *H. H. Davis* the further sum of 100*l.*, bargained, sold and demised the premises comprised in the indenture of lease to the defendant for all the residue then unexpired of the term, except the last five days subject to a proviso for redemption on payment of the principal moneys intended to be thereby secured, and certain interest thereon. And it was by the indenture further provided, that if default should be made in payment of the principal moneys intended to be thereby secured, or any part or parts thereof, or of the interest thereon, or of any part or parts thereof, contrary to the covenants thereinbefore contained for payment of the same, then and in such case it should be lawful for the defendant, his executors, administrators or assigns, to sell and dispose of the premises thereinbefore demised or intended so to be, with their appurtenances, for all the remainder of the term thereby created, either together or in parcels, and either by public sale or private contract, or partly by both, and as well before as after and subject to any lease or letting which might have been granted or made of the premises respectively under the powers therein contained, for such price or prices as could reasonably be gotten for the same, and with, under and subject to such conditions and stipulations as to title or otherwise, as the defendant, his executors, administrators or assigns, might deem expedient, together with full power to buy in the same or any part or parts thereof respectively, and to abandon and vary the terms of any and every sale or agreement for or relating to the sale thereof, and to resell the premises so bought in or as to which the contract should have been so abandoned, or any part or parts thereof, at any future auction or by private contract &c., without being liable for any

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loss occasioned thereby, or to demise, lease or let the several premises, or any part or parts thereof, for such term of years, or from year to year, or otherwise, and either with or without taking any fine for the same, and upon such terms and in such manner as he or they should think proper. And also, if he or they should think fit, to receive and take the rents and profits of the premises until sold, and also to make, do, give and execute, all acts, deeds, receipts, assignments and assurances requisite for carrying every such sale, lease or letting into execution either with or without the concurrence of *H. H. Davis*, his executors, administrators and assigns. And it was thereby agreed and declared that the receipt or receipts in writing of the defendant, his executors, administrators or assigns, for any money to arise from the sale or sales, lease or leases, or otherwise payable to him or them by virtue of those presents, should effectually discharge the person or persons to whom the same should be given, from being answerable or accountable for the misapplication or nonapplication, or from being in anywise bound to see to the application of the money therein respectively mentioned to be received, or from being bound or concerned to enquire into the necessity or propriety of any sale or sales, lease or leases, disposition or dispositions, which might be made by virtue of those presents.

In *December*, 1848, and *January*, 1849, the defendant advanced sums of money, making together the further sum of 100*l.* agreed to be advanced by the defendant. *H. H. Davis* made default in payment of the mortgage moneys and interest secured by the indenture of the 18th *November*, 1848, and afterwards became bankrupt.

The defendant, on the 3rd *April*, 1851, offered the

property comprised in the mortgage for sale by public auction, but there were no bidders.

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On the 12th *May*, 1852, the defendant, by *Edward Mackeson*, as his agent, entered into a contract with *H. Paine* for the sale of the property for 550*l.* The contract stated that *H. Paine* had become purchaser of the property for the sum of 550*l.*, subject to the conditions of sale.

The fifth condition was as follows :

“The vendor, being a mortgagee and selling under a power of sale in his mortgage deed, shall not be required to enter into any other covenant than the usual covenant that he has not incumbered, and no objection shall be taken by reason of the sale being made under these conditions ; at the time of the mortgage to the vendor on the 18th *November*, 1848, there were two judgments against the mortgagor, one at the suit of *F. R. Smith*, obtained on the 19th *June*, 1848, the other at the suit of *Hannah Willett*, obtained on the 18th *May*, 1848, and by two memorandums dated respectively the 15th *November*, 1848, the said *F. R. Smith* and *Hannah Willett* respectively consented to postpone his and her judgment, and agreed that the mortgage to the vendor should be a prior charge upon the premises sold ; such respective agreements shall be considered and taken as if the same were a satisfaction at law and in equity of the said judgments,” &c.

At the date of this contract there was due to the defendant a larger sum than 550*l.* for principal, interest and costs on his mortgage.

By indenture dated the 15th *May*, 1852, and made between the defendant of the first part, *Edward Mackeson* of the second part, and *H. Paine* of the third part, reciting, amongst other things, the indentures of the 17th

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October, 1848, and the 18th November, 1848, and that default had been made in the payment of the principal moneys and interest, and that the defendant as mortgagee had contracted and agreed with H. Paine for the absolute sale to him of the premises at or for the price of 550l.; and that it had been agreed that the sum of 500l. portion of the purchase money of 550l. should remain on mortgage of the premises, and should be secured in manner thereafter mentioned: It was witnessed that in pursuance and performance of the agreement, and in consideration of the sum of 50l. (portion of the purchase money or sum of 550l.) paid by H. Paine to the defendant, and also in consideration of the covenant thereafter contained for payment of the sum of 500l., the residue of the purchase money or sum of 550l., the defendant in pursuance of the power or authority reposed in him by the indenture of the 18th November, 1848, as mortgagee, and of every other power and authority in anywise enabling him in that behalf did at the request of H. Paine, testified &c., bargain, sell and assign unto Edward Mackeson, his executors, administrators and assigns, all and singular, and such part and parts of the premises comprised in the indenture of lease of the 17th October, 1848, as were comprised in and demised by the indenture of the 18th November, 1848, with the appurtenances, to hold the premises thereinbefore assigned or intended so to be, subject nevertheless to the rent, covenants, conditions and agreements reserved and contained in the indenture of the 17th October, 1848, but freed and discharged from all principal moneys and interest intended to be secured by the indenture of the 18th November, 1848, unto Edward Mackeson, his executors, administrators and assigns, upon certain trusts for sale in case H. Paine

should make default in payment of the sum of 500*l.* and interest. And it was thereby declared that *Edward Mackeson* should stand possessed of the proceeds of sale Upon trust in the first place to pay the costs of the sale, and in the next place to pay, retain and satisfy the sum of 500*l.* and interest. And lastly, to pay or cause to be paid the residue of the moneys unto *H. Paine* or other the person or persons for the time being entitled to the same, or as he or they should appoint. And it was thereby declared and agreed that, upon satisfaction of the trusts, *Edward Mackeson* should assign the premises to *H. Paine*, and *H. Paine* thereby, amongst other things, covenanted for himself, his heirs, executors and administrators, with and to the defendant, his executors, administrators and assigns, that he, his executors, administrators and assigns, should and would well and truly pay or cause to be paid unto the defendant, his executors, administrators or assigns, the principal sum of 500*l.* and interest for the same after the rate of 5*l.* per cent. per annum in manner following (that is to say): 100*l.*, part of the principal sum and interest for the whole thereof at the rate aforesaid on the 15th *May*, 1853, and the like sum of 100*l.*, other part of the principal sum, on the 15th *May* in each succeeding year, until the whole of the principal sum should be paid, with interest at the rate aforesaid for so much of the principal sum as should from time to time remain unpaid, and in default of payment it should be lawful for *Edward Mackeson*, at the request of the defendant, to sell and dispose of the premises.

The draft of the indenture of the 15th *May*, 1852, was perused by an independent solicitor on behalf of *H. Paine*, and he paid the 50*l.* mentioned in the deed. On the execution of the deed *H. Paine* was

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let into possession of the premises, and he personally occupied them until some time after his bankruptcy. During the time of his occupancy *H. Paine* paid the ground rent payable under the lease, and also insured and repaired the premises. He paid the interest on the sum of 500*l.* referred to in the deed of 1852, and paid 200*l.* on account of the principal. This sum of 200*l.* was paid as follows : 1852, *May* 12th, 50*l.* ; 1853, *June* 20th, 50*l.* ; 1854, *May* 1st, 100*l.*

The defendant credited the whole sum of 550*l.* to *H. H. Davis*. There was a much larger sum due to the defendant, and *H. H. Davis* was bankrupt. His estate paid no dividend, and there were no assets. The defendant did not prove against *H. H. Davis's* estate for the balance due to him. The defendant on the 7th *July*, 1854, advanced to *H. Paine* a further sum of 150*l.* on security of the property. On the occasion of this advance a deed was executed whereby *H. Paine* charged the premises with the payment of 150*l.*, in addition to the 300*l.* due on the prior mortgage.

H. Paine made default in payment of the principal and interest secured by the indenture of the 7th *July*, 1854, and afterwards became bankrupt.

In *December*, 1859, the defendant agreed to sell the premises to *L. J. Marshall* for 425*l.*

By indenture dated the 14th *December*, 1859, and made between *Edward Mackeson* of the first part, the defendant of the second part, and *L. J. Marshall* of the third part, and which indenture was duly executed by the defendant and all the parties thereto. After reciting (amongst other things) the indentures of the 17th *October*, 1848, and 18th *November*, 1848, and that in pursuance of the power of sale contained in the latter deed the defendant sold the premises to *H. Paine*,

also the indentures of the 15th *May*, 1852, and 7th *July*, 1854, *Edward Mackeson*, for the considerations therein mentioned, at the request of the defendant assigned, and the defendant confirmed, unto *L. J. Marshall*, the premises comprised in and demised by the indenture of lease of the 17th *October*, 1848, and assigned by the indenture of the 15th day of *May*, 1852, To hold to *L. J. Marshall*, his executors, administrators and assigns, for the residue then to come of the term of 108 years, except the last five days thereof, subject as therein mentioned. And thereby each of them, *Edward Mackeson* and the defendant, as to his own acts only, covenanted for himself, his heirs, executors and administrators, with *L. J. Marshall*, his executors, administrators and assigns, that *Edward Mackeson* and the defendant had not, nor had either of them, at any time or times made, done, committed or executed or knowingly or willingly permitted or suffered or been parties or privies or party or privy to any act, deed, matter or thing whatsoever whereby or by reason or means whereof the premises, or any of them, or any part or parts thereof, were, was, could, should or might be in anywise impeached, charged, incumbered or otherwise prejudicially affected.

L. J. Marshall took possession of the premises pursuant to this deed, and in or about the month of *September*, 1863, agreed to sell them to the plaintiff for 700*l*.

By indenture dated the 18th *September*, 1863, and made between *L. J. Marshall* of the one part and the plaintiff of the other part, which indenture was duly executed by all the parties thereto, *L. J. Marshall*, in consideration of 700*l* then paid to him by the plaintiff, assigned, transferred and set over unto the plaintiff the

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premises demised by the indenture of lease, To hold to the plaintiff for the residue then to come of the term of 108 years, less the last five days thereof, subject as therein mentioned.

On the execution of this deed the plaintiff paid to *Marshall* the purchase money and was let into possession of the premises.

At the time of entering into the contract for purchase, and at the time of paying his purchase money, the plaintiff had no personal knowledge of the contract entered into by the defendant on the 12th *May*, 1852, nor of any of the facts mentioned in this case, except so far as they are disclosed by the several deeds. Messrs. *Mackeson & Goldring* acted as the solicitors of the defendant in all the transactions entered into by him with respect to the property. They also acted as the solicitors of *L. J. Marshall* with respect to the property, and also as the plaintiff's solicitors in preparing the indenture of the 18th *September*, 1863, and they were then aware of all the circumstances, but did not communicate to the plaintiff the objection to the title, if any, created by the deed of the 15th *May*, 1852.

On the completion of the purchase from *Marshall* all the original deeds were delivered to the plaintiff, and they have ever since been in his possession or in that of those claiming under him. The plaintiff has since the date of his purchase continued in the occupation of the premises. No application or process or proceeding of any kind has been taken or made by or on behalf of any person or persons whomsoever in any way to interfere with the beneficial occupation or enjoyment of the premises by the plaintiff, but upon his attempting to raise money upon the security of the premises he was met by the objection that his title was bad, on th

ground that the sale by the defendant to *H. Paine* carried out by the mortgage of the 15th *May*, 1852, was not a due exercise of the power of sale in the mortgage of the 18th *November*, 1848.

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Copies of the deeds and of the contract of the 12th *May*, 1852, accompanied and were to be taken as part of the case.

It was agreed that the Court should be at liberty to draw any inferences and find any facts which a jury ought to have drawn or found.

The questions for the consideration of the Court were, whether the plaintiff was entitled to succeed on either of the breaches in the declaration.

Joshua Williams (*Beresford* with him), for the plaintiff.—First. The mortgagee did not duly exercise the power of sale contained in the deed of 1848, because in the pretended sale under the deed of 1852 he allowed part of the purchase money to remain on mortgage and thereby affected the premises with a fresh mortgage. Therefore he could not give the plaintiff a good title. The intention of a power of sale is that the account between the mortgagor and mortgagee should be closed, and that the property should be sold for ready money or as near thereto as is reasonable. The getting rid of one mortgage and substituting another is not a *bonâ fide* exercise of the power. Unless the mortgagee sells out and out a door is opened for collusion. [*Lush J.* Would not the mortgagee be liable to account to the mortgagor supposing he chose to give credit instead of receiving cash?] That point has never been decided. The receipt clause shews that the power of sale is conditional on the mortgagee getting a receipt for the purchase money. [*Lush J.* If the purchaser does not take a receipt for

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the purchase money he is bound to see to the application of it, but the absence of a receipt does not incumber the title. Suppose the amount of the purchase money exceeded the principal money due on the mortgage, the mortgagor could sue in equity for the balance. Must not the mortgagor be taken to have had the benefit of the whole amount of the purchase money? Is not the whole question this, whether the sale was *bonâ fide* or colourable in order to deprive the mortgagor of the right to redeem?] It does not appear that at the time of the sale the whole of the purchase money was credited to the mortgagor. [*Mellish*, for the defendant. — It is stated in the body of the deed of 1852 that the premises were to be held “freed and discharged from all principal moneys and interest intended to be secured by the said indenture of the 18th November, 1848,” which is the first mortgage. *Lush J.* The mortgagee meant to exercise the power of sale, and I should infer that he credited the mortgagor with the purchase money at the time when he ought to have done so.] There is nothing to shew that either of the judgment creditors mentioned in the fifth condition of sale might not file a bill to redeem and set aside the sale on the ground that there was no sale in pursuance of the power; and they have an inducement to do so because the property is greatly increased in value by buildings. [*Lush J.* The judgment creditors cannot be in a better position than the mortgagor.]

A power of sale contained in a mortgage deed must be strictly exercised. In *Hobson v. Bell* (a) it was held that the unsupported declaration of the mortgagee was not, as against a purchaser, sufficient evidence that the event had happened on which the right of exercising

(a) 2 Beav. 17.

the power of sale was to arise. In *Robertson v. Norris* (a), where a mortgagee under an improper exercise of a power of sale himself became the purchaser of the property, the Court decreed redemption after a lapse of fifteen years. *Stuart* V. C. said, p. 424, "What appears upon the evidence is this, that the power of sale was exercised by the mortgagee for other purposes and with other views than the merely receiving payment of the debt." [*Lush* J. There the mortgagee did not sell, for he could not sell to himself; he attempted to convert himself into owner, which could only be done under a decree of the Court of Chancery.] Here the plaintiff sold partially to himself. In *Davey v. Durrant* (b), where the mortgagee sold to *Packe*, and the agreement for the purchase was that the mortgagee would either allow part of the purchase money to remain on mortgage, or would procure the amount for the purchaser upon mortgage, and the transaction was carried into effect by a mortgage being made by *Packe* to a person who was believed on his part to have actually advanced the money, it was held that the mortgagor was not entitled to redeem. But the grounds of the opinions of the Lords Justices were different. *Knight Bruce* L. J. expressed himself very guardedly thus, p. 553, "It was said that the arrangement by which part of the purchase money was suffered to remain on a mortgage of the property sold was such as to reduce the price, and was otherwise unjustifiable. But that arrangement appears to me to have increased rather than diminished the price, if the price was at all affected by it. Nor can I say that it is beyond the right or authority of a mortgagee with a power of sale to effect a sale, of which one of the terms shall be that

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even a considerable portion of the purchase money shall be allowed to remain on mortgage of the property, that mortgage being as between the seller and those entitled to the equity of redemption at the seller's risk ; that is, he charging himself with the whole amount of the purchase money on account with them, as has been done in the present instance." In that case the mortgagee gave a receipt for the whole amount ; and *Turner* L. J. founded his opinion on the special clause, pp. 536-7, which is not in this deed. He said, p. 558, "It was objected, on the part of the plaintiffs, that, by the terms of the agreement for the purchase, part of the purchase money was to remain upon mortgage, and it was insisted that this was a stipulation which a mortgagee with a power of sale was not warranted in agreeing to." After stating what the agreement was and how the transaction was carried into effect, he said, "I doubt therefore whether this objection on the part of the plaintiffs at all arises. But, supposing it to arise, I find, on referring to the power of sale in the mortgage deed, that all arrangements made by the mortgagee are to be as binding as if the mortgagor, his heirs or assigns, had concurred, and I think, therefore, that this objection is wholly untenable." [*Lush* J. That clause would dispense with evidence of there having been default in payment of the mortgage money, the evidence of which, in *Hobson v. Bell* (a), was held insufficient.] Lord *St. Leonards*, in his *Vend. and Purch.*, p. 66, 14th ed., observes on *Davey v. Durrant* (b), "It seems to have been considered that under such a power of sale, a part of the purchase money may be left on mortgage, but this point did not arise as the mortgage was a distinct transaction, and the mortgagee who sold submitted to be charged with the whole

(a) 2 *Beav.* 17.

(b) 1 *De G. & J.* 535.

of the purchase money, and that, one of the Lords Justices considered, was the proper course." [*Lush J.* If a mortgage by a distinct transaction would have been good, the question is one of form only: the substance is the same in both cases.]

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Secondly. If the sale was not within the power, it prejudicially affected the title, and would be a breach of the covenant to be implied from the recital in the deed of the 14th *December*, 1859, either by itself, or taken in conjunction with the covenant against incumbrances. [He cited *Severn and Clerk's Case*, per *Clench J.* (a), *Lady Cavan v. Pulteney* (b), *Stroughill v. Buck* (c), *Ex parte Collins* (d), cases cited in *Bac. Abr. Covenant* (B), *Sugd. Vend. and Purch.*, 602-3, 14th ed.]

Thirdly. The benefit of this covenant runs with the land, and the covenant extends back to past acts; *Calvert v. Sebright* (e), per *Romilly M. R.* [*Lush J.* We are with you at present upon that point.]

Mellish (*Gray* and *Mackeson* with him), for the defendant, declined to argue that the assignee had not a right to bring the action.

As to the question whether there was a valid sale under the power: it is an admitted fact that there was a valid contract of sale; and in equity that is a sale. In a suit for specific performance against a purchaser under a power of sale, the mortgagor need not be made a party; *Corder v. Morgan* (f), *Clay v. Sharpe* (g). The legal

(a) 1 *Leon.* 122.(b) 2 *Ves.* 544.(c) 14 *Q. B.* 781.(d) 2 *Ir. Chan. Rep.* 618.(e) 15 *Beav.* 156. 160.(f) 18 *Ves.* 344.(g) 18 *Ves.* 346, note (77); *Sugd. Vend. and Purch. App.* No. 13, 11th ed.

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estate passes independently of the power of sale: that power is only wanted for the security of the mortgagee in order to bar the equity of redemption. The purchaser is the person to determine how the sale shall be carried out; he may say that the conveyance shall be to a trustee to him or to a third party. In an action of covenant it is not sufficient to raise a doubt as to the title; it must be proved to be bad. There are already difficulties enough in the way of making a good title without adding another. Here the question is, whether the deed *bonâ fide* carries out the contract? As a matter of conveyancing, it is more accurate to do it by one deed, for if an interval passed between the two a judgment might intervene. The power of sale in this deed is in substance the same as that in the deed in *Davey v. Durrant (a)*, where *Turner* L. J. does not dissent from the opinion expressed by *Knight Bruce* L. J. The special clause which he refers to was inserted *ex majori cautelâ*. There was an appeal to the House of Lords, but it was withdrawn before argument. From the observations of Lord *St. Leonards* in his *Vend. and Purch.*, p. 66, 14th ed., it might be inferred that he had not read that case. After the mortgagee had credited the mortgagor with the amount of the purchase money, a plea of payment would have been an answer to an action of covenant for the mortgage money, nor could the mortgagee have proved against the estate of the mortgagor in bankruptcy.

Joshua Williams, in reply.—Suppose the property had been sold for a larger sum than was due on the mortgage,

(a) 1 *De G. & J.* 535.

it would make a difference to the mortgagor whether the mortgagee actually received the purchase money; the purchaser who became the second mortgagor might not be a man of substance. Leasehold property becomes less valuable every day. At any rate there is a potential injury to the mortgagor.

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LUSH J. It is unnecessary to decide the second point, on the construction of the covenant in the deed of 1859, as we are clearly of opinion that the power of sale given by the mortgagor was duly exercised by the defendant. And if the authority to sell was duly and bonâ fide carried out by the mortgagee, the right of the mortgagor to redeem was barred.

The power of sale is given in very extensive terms, and is not fettered by any conditions or restrictions such as Mr. *Williams* says must be implied. [His Lordship read it.] Mr. *Williams* contends that the receipt clause amounts to a condition or restriction on the power of sale, and makes it obligatory on the mortgagee, in order duly to execute the power, to sell for money paid down, and give a receipt. But that is not so. The stipulation as to discharging the purchaser, so far from being a restriction on the power of sale, is an independent agreement intended to facilitate the sale by relieving the purchaser from the obligation to see to the application of the purchase money. The only question is, has the power of sale been bonâ fide exercised? I agree that if under the pretence of a sale there was only an assignment of the mortgage, or some contrivance by which the mortgagee should clothe himself with the absolute though not apparent ownership for the purpose of ousting the mortgagor of his

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right of redemption, the sale would not be valid. If however there was a real bonâ fide sale, it is immaterial to the mortgagor how it was carried out and how the payment of the purchase money was made: the right of redemption is gone. Mr. *Williams* admits that the contract of sale was valid, and the right of the mortgagor so far barred; but he contends that the contract was not carried out, the transaction being changed from a sale into a mortgage. It is indeed conceivable, that after the contract was made the parties might have arranged collusively that there should be an instrument which should be treated as inoperative, or that there should be a new conveyance of the property to the mortgagee. We are to draw inferences of fact; but such an inference is not within the limits of probability. It appears that after the contract of sale was made it was not convenient for the purchaser to pay the whole of the purchase money down, and there was an agreement allowing the larger part to remain on a mortgage of the property, payable by yearly instalments. And in order to have the estate as a security, instead of being conveyed to the purchaser, it was conveyed to a trustee upon trust to sell in case the purchaser should make default, and upon satisfaction of the trusts to assign the premises to the purchaser. This was merely a mode of carrying out the original contract of sale which the mortgagee and vendee had a right to adopt as most convenient to them, and in which the mortgagor had no interest. Mr. *Williams* contends that a mortgagee cannot exercise a power of sale of this description unless he receives the whole of the purchase money, and that a bargain that the greater part of it is to remain on mortgage is not a valid execution of the

power. If there were any authority for that contention we should be bound by it; and if the right of redemption was not extinguished we must give effect to it, and hold that the title was incumbered. *Davey v. Durrant*(a), which is the only authority upon the subject, is the other way, and in one respect is even stronger than the present case, because the original contract of sale in that case provided that a portion of the purchase money should not be paid down, which Mr. *Williams* contends cannot be allowed; and yet it was held that the sale was bonâ fide and a good exercise of the power. We were referred to the very high authority of Lord *St. Leonards*, in his learned work on *Vendors and Purchasers*, p. 66, 14th ed. I do not however read the passage referred to in the same sense as Mr. *Williams* does, but rather as intimating that there may be a transaction which, though apparently or colourably a sale, is not so in reality, and therefore would not be an execution of the power of sale. Here the sale and the mortgage were distinct transactions, as in *Davey v. Durrant*: there was a real sale by the mortgagee, and a real mortgage by the purchaser to secure the purchase money, and the title was not incumbered, because there was no outstanding term or right of redemption.

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HANNEN J. concurred.

HAYES J. had been counsel in the case, and therefore took no part.

Judgment for the defendant.

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-----*Friday,
November 27th.***WOODWARD and another against PELL.***Bill of ex-
change.
Liability of
acceptor.
Discharge of
acceptor by
holder.
Action by
indorsee.*

A bill of exchange accepted by the defendant was indorsed to C., who indorsed it in blank. A bank, being the holders of the bill at maturity, commenced actions against the defendant and C., and signed judgment against the defendant on the 3rd *March*. On the 21st *March*, C. paid the amount due on the bill to the bank, and an order was made to stay proceedings in that action on payment of costs: the costs were taxed, and the amount paid on the 13th *April*, and the bill was then delivered to C., who being indebted to the plaintiffs in a larger amount transferred it to them. On the 29th *March* the bank charged the defendant in execution on their judgment, but on the same day discharged him on payment of the costs. Held, that the plaintiffs were entitled to sue the defendant on the bill notwithstanding his discharge by the bank; that C.'s right of action on the bill was vested on the 21st *March*, and that the only effect of nonpayment of the costs was that the bank had a lien upon the bill for their amount.

DECLARATION against the defendant as acceptor of a bill of exchange for 300*l.*, drawn by Messrs. *Cresswell and Sons*, indorsed by them to *H. W. Cresswell*, who indorsed it to the plaintiffs, with the common counts for money paid, for interest, and upon accounts stated.

First plea to the first count. That when the bill became due *The Metropolitan and Provincial Banking Company (Limited)* were holders of it, who thereupon impleaded the defendant as the acceptor of the bill in an action for the recovery of the amount, in which action they recovered judgment against him for the amount of the bill and all damages sustained by them by reason of the nonpayment thereof, together with their costs of suit; and afterwards the Company issued a writ of *capias ad satisfaciendum* upon the judgment in the usual form and duly indorsed to levy the debt, damages and costs against the now defendant directed to the sheriff of *Middlesex*, under which writ the now defendant was arrested by and detained in the

custody of the sheriff until he was released and discharged therefrom by the Company, and afterwards and after such release and discharge the Company transferred the bill to the plaintiffs, and the plaintiffs took and received the same with notice of the premises.

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Second plea to the residue of the declaration. Never indebted.

Replication to the first plea. That after the bill had been indorsed to *H. W. Cresswell*, the banking Company became the holders of the bill as transferees and indorsees of and from *H. W. Cresswell*, and that upon the maturity and dishonour of the bill *H. W. Cresswell* was liable to pay the amount of it to the bank as holders thereof by reason of his having indorsed the same in blank and transferred it to them, and, before they recovered judgment and issued the writ of execution against the defendant, *H. W. Cresswell* had been compelled by proceedings duly taken by and at the suit of the banking Company to pay, and had paid to them the amount of the bill, and had taken up the same and thenceforth became and was the lawful holder of the bill until he afterwards indorsed the same for valuable consideration to the plaintiffs, and the plaintiffs thenceforth became and were the bonâ fide holders of the bill for value, and the defendant did not at any time pay or discharge the amount of the bill or any part thereof to the banking Company or to any other person.

Issue thereon.

The action was tried, before *Keating J.*, at the *Gloucester* Summer Assizes, 1866, when a verdict was found for the plaintiffs, subject to the following case.

The bill of exchange upon which the action was

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brought was a bill for 300*l.* dated the 7th *August*, 1865, payable four months after date, and drawn by *Edward Cresswell and Sons* upon and accepted by the defendant. It was duly indorsed by *Edward Cresswell and Sons* to *Henry William Cresswell*, who indorsed it in blank and handed it to *J. C. Hodges*, and the latter indorsed it to his bankers, *The Metropolitan and Provincial Banking Company*, who held the bill as such indorsees at maturity. The bank commenced three actions upon it against the defendant, the acceptor, against *E. Cresswell & Sons*, the drawers, and against *H. W. Cresswell*. In the action by the bank against *H. W. Cresswell* the writ was issued on the 15th *January*, 1866. On the 13th *March*, 1866, *H. W. Cresswell*, for the purpose of taking up the bill, handed over to *J. C. Hodges* securities for an amount equal to that of the bill, and out of the proceeds of those securities and on behalf of *H. W. Cresswell*, *Hodges* paid on the 21st *March*, 1866, the amount due on the bill to *The Metropolitan and Provincial Banking Company*, whereupon, on the 3rd *April*, an order was made to stay proceedings on payment of costs. The bill remained in the hands of the bank until the costs were taxed and paid. The costs were taxed at 21*l.* 11*s.* 4*d.*, and that sum was on the 13th *April*, 1866, paid to the bank by the plaintiffs as solicitors for and on behalf of *H. W. Cresswell*, and on the same day the bill was delivered over to the present plaintiffs as such solicitors. Two or three days afterwards and before the 31st *May*, 1866, the plaintiffs, to whom *H. W. Cresswell* was indebted for costs in an amount larger than that of the bill, applied to him for money on account, and he transferred to them the bill in question, which had already been indorsed in blank

by him, in part payment of their claim against him, but there was no further or other indorsement of the bill to the plaintiffs. In the action by the bank against the defendant the writ was issued on the 29th *December*, 1865. Judgment was signed on the 3rd *March*, 1866, and on the 6th *March* the bank lodged a ca. sa. against the defendant on the judgment, which the sheriff of *Middlesex* indorsed, to satisfy 310*l.* 9*s.* 11*d.*, being the amount due on the bill and costs, and 1*l.* 5*s.* costs of execution, &c. On the 29th *March* the defendant, having been arrested in another suit, was informed by the sheriff's officer that he held this ca. sa. The sheriff's officer then communicated with the bank and received an order to detain the defendant under their execution, which he did accordingly, and subsequently, about four hours afterwards, the following order :—

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“ *Metropolitan and Provincial Bank v. Pell*.

“ Discharge the defendant as to this action on payment of 9*l.* 1*s.* 10*d.* and your fees.”

This payment was made, and thereupon the defendant was released. No receipt was given by the sheriff for the payment made to him by the defendant, but on the 12th *April*, when the sheriff paid over to the bank the sum of 9*l.* 1*s.* 10*d.*, the following receipt was given :—

“ In the Exchequer of Pleas. *The Metropolitan and Provincial Banking Company v. Geo. Pell*. Received *April* 12th, 1866, of Mr. *Bower*, officer to the Sheriff of *Middlesex*, the sum of 9*l.* 1*s.* 10*d.*, in discharge of debt and costs herein.

“ For *Davidson, Carr and Bannister*,

“ Plaintiff's Attorneys.

“ £9. 1*s.* 10*d.*

“ *James Holditch*.

“ 12/4 66.”

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This sum was the amount of taxed costs due to the bank in their action against the defendant *Pell*. No further or other payment was at any time made by the defendant *Pell* in respect of the bill. The plaintiffs on the 31st *May*, 1866, and after the bill had been transferred to them by *H. W. Cresswell*, commenced the present action.

It was agreed between the parties that the pleadings should form part of the case; also that the Court should be at liberty to draw any inferences of fact which in the opinion of the Court a jury ought to have drawn, and to make any amendments in the pleadings which the Judge before whom the cause was tried ought to have made.

The question for the opinion of the Court was, whether the defendant remained liable to pay the amount of the bill to the plaintiffs.

Matthews, for the plaintiffs.—The averment in the plea, that the bank after the discharge of the defendant by them transferred the bill to the plaintiffs, was not proved. In *Callow v. Lawrence* (a), cited in *Byles on Bills*, 165, 9th ed., Lord *Ellenborough* says, “a bill of exchange is negotiable ad infinitum until it has been paid by or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill, and if, instead of suing the acceptor, he put it into circulation upon his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill, that the holder should be at liberty to sue the acceptor.” All sureties are discharged by the discharge of the principal, and therefore the bank

(a) 3 *M. & S.* 95. 97.

by discharging the acceptor from execution discharged the prior indorsers; *English v. Darley* (a); but by discharging him from liability to them they did not discharge him as against other parties who became entitled to the bill. [*Lush J.* An indorser stands in a double position, as regards the holder he is a surety, but he is also a creditor of the acceptor: he may be discharged in his capacity of surety, but as to the acceptor and prior indorsers he remains a creditor.] Judgment without satisfaction is no payment. *Tarleton v. Allhusen* (b). And *Thompson v. Parish* (c), overruling *Littledale J.* in *Beard v. M'Carthy* (d), decides that taking a debtor in execution under a ca. sa. is not to all intents and purposes an extinguishment of the debt. Here *Cresswell*, who was a surety, having no defence to the action brought against him, paid the amount of the bill, as he was bound to do, and having acquired a right of action on the bill previously to the execution against the defendant by the bank, is seeking to recover the amount from the principal. The bank cannot release or discharge that previously acquired right. [*Hayes J.* How could the bank discharge the defendant from a debt which, having been paid by *Cresswell*, was no longer due to them?] In *Byles on Bills*, 214-5, 9th ed., it is said, "It was long an unsettled question, whether payment in part or in full by the drawer to the holder will discharge the acceptor pro tanto, or whether the holder may, nevertheless, recover the whole amount from the acceptor, and hold an equivalent to the amount received from the drawer, as money received of the acceptor to the drawer's use. . . . The better opinion, however,

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(a) 2 B. & P. 61.

(b) 2 A. & E. 32.

(c) 5 C. B. N. S. 685.

(d) 9 Dowl. P. C. 136.

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seems to be, that to an action against the acceptor, payment by the drawer is no plea, but only converts the holder into a trustee for the drawer when the holder afterwards recovers of the acceptor." If the plaintiffs could sue on a special count there is no reason why they should not sue on the bill.

Hill, for the defendant.—The bank being the holders of the bill were the only persons who could give the acceptor a discharge from execution, and they gave it on the 29th *March*, before *Cresswell* by payment of the costs became entitled to the bill. That discharge extinguished the debt for all purposes; *Jaques v. Withy (a)*, per *Ashurst J.*

Matthews, in reply.

LUSH J. The plaintiffs are entitled to judgment. *The Metropolitan and Provincial Banking Company* were the holders of the bill at maturity, and brought actions upon it against the defendant as acceptor, against the drawers, and against the indorser *Cresswell*. They obtained judgment against the acceptor on the 3rd *March*, 1866, and issued a writ of *ca. sa.*, which they lodged with the sheriff on the 6th. On the 21st, before it was executed, *Cresswell* paid the amount due on the bill to the bank. If he had paid the costs also he would have had a right to the possession of the bill, and to sue the acceptor upon it. The defendant was taken in execution on the *ca. sa.* by the bank on the 29th *March*, and discharged on the same day. But *Cresswell*, having on the 21st paid the amount due on

(a) 1 *T. R.* 557. 559.

the bill, was entitled to have the judgment obtained by the bank against the defendant assigned to him, and to proceed upon it; his right of action therefore was vested on the 21st. If the discharge of the defendant from execution by the bank were an answer to an action by *Cresswell*, the result would be that the holder by discharging the principal debtor, which was his own voluntary act, would take away the prior remedy of the surety. But it would be monstrous so to hold. Thus the matter would have stood if *Cresswell* had paid the debt and costs on the 21st *March*; the fact is that he paid the amount of the bill only on that day, and the costs not until the 13th *April*. The only effect however of the nonpayment of the costs was that the bank had a lien on the bill for their amount. *Cresswell's* title was complete on the 21st *March*, and his right of action could not be taken away by any act done by the bank after it had vested; and therefore the plaintiffs to whom this right was transferred are entitled to recover.

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HANNEN and HAYES JJ. concurred.

Judgment for the plaintiffs.

FORD and others *against* COTESWORTH and
 another.

Thursday,
December 17th.

[Reported, ante p. 559.]

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Friday,
November 27th.

MAINWARING *against* MILNER and another.

11 G. 4 & 1
W. 4. c. 70.
s. 21.
1 & 2 Vict.
c. 110. s. 3.
*Arrest on
capias to hold
to bail.
Recognizance.
Queen's
Prison Dis-
continuance
Act, 1862.
25 & 26 Vict.
c. 104.*

1. Stat. 11 G. 4 & 1 W. 4. c. 70. s. 21., by which a defendant "held to bail upon any mesne process" may be rendered either to the prison of the Court out of which process issued, or to the common gaol of the county in which he was arrested, applies to arrest on a writ of capias to hold to bail under stat. 1 & 2 Vict. c. 110. s. 3.

2. Notwithstanding the Queen's prison is by The Queen's Prison Discontinuance Act, 1862, 25 & 26 Vict. c. 104., discontinued as a debtor's prison, a recognizance of bail conditioned to render the defendant "into the custody of the keeper of the Queen's prison" is sufficient, and is satisfied by a render to the gaol of the county in which he was arrested.

DECLARATION on a recognizance of bail, by which the defendants undertook that if *W. Milner* should be condemned in an action of debt, then depending in this Court at the suit of the plaintiff, he "should satisfy the costs and condemnation, or should render himself into the custody of the keeper of the Queen's Prison, or that the defendants would do it for him."

Plea. That *W. Milner* was held to bail on a writ of capias issued under stat. 1 & 2 Vict. c. 110., under which writ he was arrested in the county of *York*; that on the occasion in the declaration mentioned, *W. Milner* in due time rendered himself to the common gaol of the county in which he was so arrested according to the form of the statute in such case made and provided.

Demurrer, and joinder.

Stat. 11 G. 4 & 1 W. 4. c. 70. s. 21. enacts, "That a defendant, who shall have been held to bail upon any mesne process issued out of any of His Majesty's superior Courts of Record, may be rendered in discharge of his bail, either to the prison of the Court out of which such process issued, according to the practice of

such Court, or to the common gaol of the county in which he was so arrested, and the render to the county gaol shall be effected in the manner following; &c., and the sheriff or other person responsible for the custody of debtors in such county gaol shall, on such render so perfected, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such."

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Stat. 1 & 2 *Vict. c.* 110., "An Act for abolishing arrest on mesne process in civil actions, except in certain cases;" &c. Sect. 1, after reciting that "the present power of arrest upon mesne process is unnecessarily extensive and severe, and ought to be relaxed," enacts "That from and after the time appointed for the commencement of this Act no person shall be arrested upon mesne process in any civil action in any inferior Court whatsoever, or (except in the cases and in the manner hereinafter provided for) in any superior Court."

Sect. 3. "If a plaintiff in any action in any of Her Majesty's superior Courts of law at *Westminster*, in which the defendant is now liable to arrest, whether upon the order of a Judge, or without such order, shall, by the affidavit of himself or of some other person, shew, to the satisfaction of a Judge of one of the said superior Courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant or any one or more of the defendants is or are about to quit *England* unless he or they be forthwith apprehended, it shall be lawful for such Judge, by a special order, to direct that such defendant or defendants so about to quit *England* shall be held to

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bail for such sum as such Judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of capias into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of capias shall be in the form contained in the schedule to this Act annexed, and shall bear date on the day on which the same shall be issued."

Ryalls, in support of the demurrer.—First. Stat. 11 G. 4 & 1 W. 4. c. 70. s. 21. applies only to a defendant held to bail upon mesne process; and a capias to hold to bail under stat. 1 & 2 Vict. c. 110. s. 3. is not mesne process within the former statute. [*Lush J.* Stat. 1 & 2 Vict. c. 110. s. 1. enacts that no person shall be arrested upon mesne process "except in the cases and in the manner hereinafter provided for."] That may reserve the right of arrest in certain cases; but in *Brown v. M'Millan* (a), where it was held that a capias under stat. 1 & 2 Vict. c. 110. s. 3. might be issued into a county palatine, although it was indorsed for a less sum than 50*l.*, notwithstanding the restriction in stat. 7 & 8 G. 4. c. 71. s. 7. that no sheriff or other officer within the counties palatine shall, upon any mesne process issuing out of the superior Courts at *Westminster*, arrest or hold any person to special bail, unless the process were indorsed for bail in a sum not less than 50*l.*, *Parke B.* said, p. 200, "The 1 & 2 Vict. c. 110. s. 1. abolishes arrest on mesne process issuing from the superior Courts, except in certain cases specially

(a) 7 M. & W. 196.

provided for. The effect of the first section, if it stood alone, would be to render the 7 & 8 G. 4. a dead letter, and to do away altogether with arrest on mesne process, in the counties palatine as well as elsewhere. But the third section gives a right of arrest in certain cases, and provides for the purpose a new writ of mesne process—not of mesne process in the sense in which the word is used in the former Act, but *mesne* in this sense, that it is a proceeding to be taken between the commencement of the suit and final judgment; which is issued for the collateral purpose of obtaining security for the amount of the plaintiff's claim, if recovered in the suit, and not for the advancement of the suit itself" (a). Stat. 1 & 2 Vict. c. 110. s. 1. abolishes the whole practice of arrest upon mesne process except so far as it is expressly reserved, and sect. 3 says nothing about rendering the debtor. In *Ireland v. Berry* (b) it was held that R. G. T. T. 3 W. 4. r. 1, which orders that a defendant who has been arrested on a *capias* shall be discharged unless the plaintiff declares before the end of the term next after the arrest, did not apply to an arrest upon a *capias* issued under stat. 1 & 2 Vict. c. 110., as the detention was on a collateral proceeding and not under process within the meaning of stat. 2 & 3 W. 4. c. 39., "for uniformity of process in personal actions." Formerly, a person however solvent might be arrested on mesne process: now a person can only be arrested if he is about to quit *England*. Also under the old process, a defendant in custody could not be discharged except for irregularity without extinguishing the debt, whereas a defendant in custody under stat. 1 & 2 Vict. c. 110. s. 3. may be discharged the

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(a) See *Baron de Mesnil v. Dakin*, 8 B. & S. 650, note (a).

(b) 5 Q. B. 551; 1 D. & L. 866.

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day after the arrest and on terms. [*Forbes*, in support of the plea, referred to R. G. H. T. 1853, 16 *Vict.*, r. 106., "On application by a defendant or his bail, or either of them, for an order to render a defendant to a county gaol, it shall be specified on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the sheriff of what county he was arrested, which facts shall be stated in the order; and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail;" &c. (See 1 *E. & B. App. I.*, p. xx.)]

Secondly. If the recognizance is right the plea does not show a performance of it, as the condition is absolute that the render of the debtor should be "into the custody of the keeper of the Queen's Prison." [*Lush J.* By The Queen's Prison Discontinuance Act, 1862, 25 & 26 *Vict. c.* 104., the Debtors' Prison for *London* and *Middlesex*, in *Whitecross Street*, is substituted for the Queen's Prison: there is no longer any prison of the Court of Queen's Bench except for criminals.]

Forbes, contra, was not called upon.

LUSH J. I give my opinion with more diffidence than I should have felt formerly. However since the passing of stat. 1 & 2 *Vict. c.* 110. it has never been doubted that the facilities for rendering defendants in discharge of their bail provided by stat. 11 *G. 4* & 1 *W. 4. c.* 70. s. 21. apply to defendants in custody under stat. 1 & 2 *Vict. c.* 110., and R. G. H. T. 1853, 16 *Vict.*, r. 106,

recognizes the practice under the former statute as still continuing. Stat. 11 *G.* 4 & 1 *W.* 4. c. 70. s. 21. enacts that the debtor may be rendered either to the prison of this Court or to the common gaol of the county, and uses the term *mesne process*, which is as much applicable to a writ of *capias* under stat. 1 & 2 *Vict.* c. 110. s. 3. as to the old writ. The distinction between the two is, that at the time of the passing of the former Act the writ of *capias* was the commencement of the action and could be issued at the will of the party, whereas since stat. 2 & 3 *W.* 4. c. 39. s. 1. all personal actions in the superior Courts are commenced by writ of summons, and the present writ of *capias* under stat. 1 & 2 *Vict.* c. 110. s. 3. is collateral to the action, and is only issuable by special order of a Judge. But it is *mesne process* in the sense that it is preliminary, as distinguished from final process, the object of it being to obtain security for the debt if recovered, not to keep the debtor in prison as a satisfaction of the debt. And every reason which existed for stat. 11 *G.* 4 & 1 *W.* 4. c. 70. s. 21. applying to persons in custody before the passing of stat. 1 & 2 *Vict.* c. 110. applies now.

Then, assuming that a render to the county gaol would be a discharge of the bail if the recognizance were properly framed, is this render a discharge, the recognizance being in its present form? I do not say that the recognizance might not have been more properly framed so as to give notice to both parties of what the defendants were bound to do. When the form of this recognizance was first used, the Queen's Prison, which belonged to this Court, was intended; but stat. 25 & 26 *Vict.* c. 104. has abolished that prison as a place of imprisonment for debtors, and the recognizance

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 MAIRWARING therefore read the words as signifying any of the
 v. Queen's prisons in *England*, to which, under stat.
 MILNER. 11 G. 4 & 1 W. 4. c. 70. s. 21., the debtor may law-
 fully be rendered.

HANNEN J. The first question is, what did the bail by this recognizance undertake should be done? They could not render the debtor to a prison which was not proper for that purpose. The recognizance must be taken to mean that prison which by law is substituted for the Queen's prison. According to *Chitty's Forms of Practical Proceedings in the Courts of Queen's Bench, &c.*, p. 408, 9th ed., the condition of the recognizance of bail, whether in this Court, in the Common Pleas or in the Exchequer, is, that the defendant render himself to "the keeper of the Queen's prison": the form is not in the alternative.

The only remaining question is, whether this was an arrest on mesne process. The title of stat. 1 & 2 Vict. c. 110. and its enactment in sect. 1 evidently shew that the Legislature intended that mesne process, viz., that which is not final process, should continue in certain cases.

HAYES J. I agree in the last observation; and since the passing of stat. 25 & 26 Vict. c. 104. the only mode in which a render of the defendant can be made is to the gaol of the county in which he is arrested, which is the gaol of the sheriff.

Judgment for the defendants.

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The NORTH EASTERN Railway Company, appellants, The Local Board for the district of SCARBOROUGH, respondents.

SAME, appellants, SAME, respondents.

1. The general district rate made by a Local Board of Health constituted under The Public Health Act, 1848, 11 & 12 *Vict. c. 63.*, and The Local Government Act, 1858, 21 & 22 *Vict. c. 98.*, is not a rate "which by law is required to be based upon the poor rate" within The Union Assessment Committee Act, 1862, 25 & 26 *Vict. c. 103. s. 28.*, and therefore, if the assessment for the relief of the poor is not in the judgment of the Local Board a fair criterion for the general district rate, they may make a new valuation in pursuance of sect. 56 of stat. 21 & 22 *Vict. c. 98.*

2. The parish of *S.* is coextensive with the borough and district, and comprises within it the townships of *S.* and *F.*, each separately maintaining its own poor. In 1867 the Local Board made two district rates, and, the poor rate being in their judgment not a proper criterion, ordered a new valuation. At that time there was in force in the townships of *S.* and *F.* respectively a valuation list for assessing the poor rate under The Union Assessment Committee Act, 1862, 25 & 26 *Vict. c. 103.* Held, that the Local Board were not bound to adopt the poor law assessment.

3. On the argument of a special case stated under stat. 12 & 13 *Vict. c. 45.* or stat. 20 & 21 *Vict. c. 43.*, the appellant begins; reversing the practice recognized in *The Overseers of Hilton and Walkerfield*, appts., *The Overseers of Bowes*, respts., 7 *B. & S.* 223.

Saturday,
November 28th.

General district rate.
Valuation list.
Local Government Act,
1858, 21 & 22
Vict. c. 98.
s. 56.
Union Assessment Committee Act,
1862, 25 & 26
Vict. c. 103.
s. 28.
Practice on appeal.

TWO general district rates having been made by the respondents under The Public Health Act, 1848, 11 & 12 *Vict. c. 63.*, and The Local Government Act, 1858; 21 & 22 *Vict. c. 98.*, after notice of appeal to the Quarter Sessions for the borough of *Scarborough*, in the county of *York*, against each of the rates respectively, the facts in each of the appeals were stated in a special case under stat. 12 & 13 *Vict. c. 45.*

The district of *Scarborough*, for which the respondents are the Local Board, is co-extensive with the borough of *Scarborough*. The parish of *Scarborough* is co-

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extensive with the borough and district, and comprises within it the townships of *Scarborough* and *Falsgrave*, each separately maintaining its own poor.

The first of the appeals was against a general district rate made in *May*, 1867. The hereditaments and premises in respect of which the appellants were rated were situate in the township of *Scarborough* and were assessed and assessable to a rate for the relief of the poor of the township. The Union Assessment Committee Act, 1862, 25 & 26 *Vict. c. 103.*, was applicable at the time of making the rate to the township of *Scarborough*, and there was then in force in the township, pursuant to the Act, a valuation list for assessing the rate for the relief of the poor, which was duly allowed, approved and delivered to the overseers by the assessment committee of the *Scarborough* Union, in which the township was comprised. In the rate for the relief of the poor made next before the making of the district rate of *May*, 1867, the hereditaments therein included were respectively rated according to the annual rateable value appearing in the valuation list pursuant to The Union Assessment Committee Act, 1862. .

The rate for the relief of the poor being in the judgment of the respondents an unfit criterion for making a general district rate, a valuation was made by some of the members of the Board appointed as a sub-committee for that purpose, and the annual rateable value of the hereditaments occupied by the appellants in the township of *Scarborough* was ascertained and fixed with reference to and in accordance with the last mentioned valuation, and did not accord with the annual rateable value of the same appearing in the valuation list of the assessment committee, nor was the district rate of *May*,

1866, assessed upon the net annual value of the property rated thereby as ascertained by the rate for the relief of the poor made next before the making of the district rate.

The second appeal was against another general district rate made by the respondents on the 27th *September*, 1867, in which the appellants were rated in respect of hereditaments and premises in the townships of *Scarborough* and *Falsgrave*.

This rate was not assessed upon the net annual value of the property thereby rated as ascertained by the rates for the relief of the poor for the townships of *Scarborough* and *Falsgrave* made next before the making of the general district rate, nor were the hereditaments included therein rated according to the annual rateable value thereof appearing in the valuation lists then in force in the townships pursuant to The Union Assessment Committee Act, 1862, but upon the net annual value of the property rated thereby ascertained and fixed with reference to and in accordance with a valuation previously made by a person appointed by the respondents for that purpose in manner prescribed by sect. 56 of The Local Government Act, 1858; the rate for the relief of the poor for the townships of *Scarborough* and *Falsgrave* respectively made next before the making of the district rate being in the judgment of the respondents an unfit criterion for making a general district rate.

The question for the opinion of the Court was, whether the respondents had a right or power to appoint a person or persons to make a valuation for the purpose of the general district rates, and to ascertain the net annual value of the hereditaments by reference to the valuation provided by sect. 56 of The Local

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1868. Government Act, 1858, the assessments for the relief of the poor made next before the making of each of the said district rates being in their judgment an unfit criterion for a general district rate;—or whether, the general district rates being rates which by law are required to be based upon the poor rate, such right or power was taken away by The Union Assessment Committee Act, 1862, sect. 28, or otherwise, and consequently the hereditaments included in the district rates must be rated according to the annual rateable value thereof appearing in the valuation list in force at the time of the making of each of the rates.

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By sect. 55 of The Local Government Act, 1858, 21 & 22 *Vict. c. 98.*, the 88th and 95th sections of The Public Health Act, 1848, are repealed, and in lieu thereof it is enacted “That the general district rates shall be made and levied upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor, and shall be assessed upon the full net annual value of such property, ascertained by the rate (if any) for the relief of the poor made next before the making of the assessments under this Act, &c.

Sect. 56, after providing that for the purpose of assessing the general district rate the Local Board are to have access to the poor rate books, enacts, “If there is no such assessment as aforesaid for the relief of the poor by reference to which such net annual value can be estimated, or if such assessment is, in the judgment of the Local Board, an unfit criterion for making a general district rate, a valuation shall be made by a person appointed by the Local Board for that purpose, in manner, as near as circumstances will permit, prescribed by” stat. 6 & 7 *W. 4. c. 96.*, “or any other Act for

the time being in force for regulating parochial assessments; and the net annual value of the property shall be ascertained by reference to the said valuation and assessments."

By The Union Assessment Committee Act, 1862, 25 & 26 *Vict. c. 103. s. 28.*, "In every parish where a valuation list under this Act has been approved and delivered to the overseers, no rate for the relief of the poor, or other rate which by law is required to be based upon the poor rate, shall be of any force, unless the hereditaments included in such rate, except as hereinafter provided, be rated according to the annual rateable value thereof appearing in the valuation list in force in such parish;" &c.

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Manisty (*C. W. Woodall* with him) appeared for the respondents.

LUSH J. We have come to the conclusion, in accordance with the practice in the other Courts, that in cases stated under stats. 12 & 13 *Vict. c. 45.* and 20 & 21 *Vict. c. 43.* the appellant should begin (a).

Maule (*A. W. Simpson* with him), for the appellants.—The district rate is impliedly a rate which "by law is required to be based upon the poor rate." The Local Government Act, 1858, 21 & 22 *Vict. c. 98.*, s. 55. repeals sect. 88 of The Public Health Act, 1848, 11 & 12 *Vict. c. 63.*, and that section and sect. 56 re-enact it with the addition of a discretionary power to assess property for the district rate by having a fresh valuation made,

(a) See *Ellis v. Kelly*, 6 *H. & N.* 222; reversing the practice recognized in *The Overseers of Hilton and Walkerfield*, appts., *The Overseers of Bowes*, respts., 7 *B. & S.* 223. 224, pl. 2. 234.

1868. <hr/> NORTH EASTERN Railway Company v. SCAR- BOROUGH Local Board.	instead of taking the poor rate assessment as the standard of rateable value; and that was then reasonable, for each parish had the power of making and levying its own poor rate; and if the assessment for the district rate had necessarily followed that for the poor rate, the overseers of one of the parishes in the district might, by undervaluing the property in it, have given it an unfair advantage over the others in its contribution to the district rate. But the necessity for that ceased after The Union Assessment Committee Act, 1862, 25 & 26 <i>Vict. c. 103.</i> , the preamble of which recites that "it is expedient that more effectual provision should be made for securing uniform and correct valuations of parishes in the unions of <i>England</i> ," was passed to cure this evil. In order that the taxation of property throughout the union may be uniform, the power of assessing it in the union is given by sect. 16 to the Committee appointed under that Act, in the same manner that the duty of assessing property in a parish as between individuals was in the overseers; and sect. 32 gives to the overseers of any parish aggrieved by the valuation list an appeal to the Quarter Sessions. If the assessment committee have a discretion, the appellants will be liable to rates based on different valuations in the same area. Stat. 15 & 16 <i>Vict. c. 81.</i> contains a series of enactments, viz., sects. 2, 6, 9 and 15, relating to the assessment and the collection of the county rate, not unlike sects. 55 and 56 in stat. 21 & 22 <i>Vict. c. 98.</i> , but there is no language in those sections so strong as that in sect. 55 of stat. 21 & 22 <i>Vict. c. 98.</i> , which enacts that the district rates "shall be assessed upon the full net annual value of such property ascertained by the rate (if any) for the relief of the poor." And yet The County Rate Act, 1866, 29 & 30 <i>Vict. c. 78.</i> , recites that
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"doubts are entertained whether the powers of the justices under" stat. 15 & 16 *Vict. c. 81.* "are not impliedly interfered with or controlled by" The Union Assessment Committee Act, 1862: and enacts by sect. 1 that nothing contained in the last mentioned Act shall apply to any assessment made by any committee of justices under stat. 15 & 16 *Vict. c. 81.* [*Lush J.* It only recites the existence of doubts (a).]

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Manisty (*C. W. Woodall* with him), for the respondents.—The other rates referred to in stat. 25 & 26 *Vict. c. 103. s. 28.*, as required by law to be based upon the poor rate, are the county and police rates. [He was then stopped.]

LUSH J. Stat. 11 & 12 *Vict. c. 63. s. 88.* required the general district rate, as well as the special rate, to be based upon the rate for the relief of the poor. That imperative enactment was repealed by stat. 21 & 22 *Vict. c. 98. s. 55.*, and sect. 56, which was substituted for it, gave the Local Board an option as to the district rate to adopt the poor rate assessment or make a new valuation. That option is not taken away by stat. 25 & 26 *Vict. c. 103. s. 28.* The latter enactment only renders the valuation list made under that Act the basis of all rates which "by law" are "required to be based upon the poor rate." Mr. *Maule* has addressed to us an urgent argument that it would be reasonable that the enactment should include the general district rates, and that the power of appointing a special valuer for the purpose of those rates should be abolished. However that may be, the enactment is not in its terms

(a) Stat. 29 & 30 *Vict. c. 78. s. 1.* is repealed by The Valuation (Metropolis) Act, 1869, 32 & 33 *Vict. c. 67. s. 77.*, fifth Schedule.

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wide enough to include them, and, the Local Board having an option either to adopt the poor rate or to make a valuation of their own for the general district rate, it cannot be said that this is a rate *required* to be based upon the poor rate.

HANNEN and HAYES JJ. concurred.

Judgment for the respondents.

IN THE EXCHEQUER CHAMBER.

Saturday,
 November 27th.

HYAMS *against* WEBSTER.

*Metropolis
 Management
 Act, 1855,
 18 & 19 Vict.
 c. 120. ss. 110,
 111.
 Breaking up
 street.
 Responsibility
 of contractor.
 Subsidence
 of soil.*

Where a contractor has opened a road under The Metropolis Management Act, 1855, 18 & 19 *Vict. c. 120. s. 110.*, his obligation under that section and sect. 111 as between him and the public ceases as soon as he has properly reinstated the road, though its defective condition arises from the natural subsidence of the soil. Judgment of the Queen's Bench, 8 *B. & S.* 272, affirmed.

THE plaintiff having appealed from the decision of the Court of Queen's Bench, making absolute a rule for entering a nonsuit (see 8 *B. & S.* 272), the case was argued by

Laxton, for the plaintiff.—The defendant is liable at common law or under a statutory obligation to look after the work and repair its defects after filling in the excavation. [He referred to The Metropolis Management Act, 1855, 18 & 19 *Vict. c. 120. ss. 69, 110, 111.*] This being no longer a turnpike road is a "street" within those sections, for by the interpretation clause, sect. 250, the word "street" applies to and in-

cludes any highway except the carriage way of any turnpike road. [*Byles J.* The Metropolis Management Amendment Act, 1862, 25 & 26 *Vict. c.* 102. s. 33., makes provision for subsidence in the case of turnpike roads.] That section was cited in the judgment of the Court below ; but it shews that the Legislature make a distinction in this respect between parish and turnpike roads. Sect. 111 of stat. 18 & 19 *Vict. c.* 120. inflicts a penalty which, by sect. 227, is to be recovered by summary proceeding before justices ; but sect. 234, which regulates the application of the penalty, does not give any part of it to the party aggrieved, and therefore that party is entitled to maintain an action for the injury he has sustained ; *Couch v. Steel* (a). [He also cited *Barnes v. Ward* (b) and *Gray v. Pullen*, on appeal (c).] An action may lie both against the parish and against the contractor. In the present case the jury found that the parish had not taken to the road so as to relieve the contractor.

Montague Chambers (*Philbrick* with him), for the defendant, was not called upon.

KELLY C. B. The defendant had a duty imposed upon him of digging a trench in a highway for the purpose of constructing a sewer, and afterwards filling up the trench and reinstating the road. That part of the work where the accident happened had been finished and covered in during the summer of 1864, and the accident occurred more than six months after. The Lord Chief Justice left to the jury two questions. The first was, whether the hole was the consequence of the work

(a) 8 *E. & B.* 402.

(b) 9 *C. B.* 392.

(c) 5 *B. & S.* 981.

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executed by the defendant through a defect in the filling up or through a subsidence arising from natural causes. The jury found that the hole was occasioned by natural subsidence. That finding, taken together with the evidence, establishes that the trench was well and completely filled up, and that the work was not defectively executed. We must take it that, in the language of sect. 111 of stat. 18 & 19 *Vict. c. 120.*, the road had been “reinstated with the same or similar materials of the like quality and thickness, and cemented and bound together in the same or in an equally substantial manner as those of which it was composed, in such manner as is satisfactory to the vestry or Board.” This is all which that section requires. The second question left to the jury was, whether the parish had taken to the road so as to relieve the contractor from any obligation to look after the road and make good its defects. They found that the parish had not so taken to the road, and upon this finding the question is whether the defendant is liable for the consequences of the subsidence. If this finding was warranted by law and the facts, the case would be different. But after the defendant had completed the work and done his duty according to the requirements of the statute he had no right to interfere with the road, and therefore it is immaterial whether the parish had taken to it or not. It seems as if the jury thought that after the completion of the work the defendant was bound to look after it and to make good subsequent subsidence. That however was a mistake in point of law. The liability imposed by the 110th and 111th sections of stat. 18 & 19 *Vict. c. 120.* only amounts to this, that when a trench is made in a highway it must be filled up, and the road reinstated in a proper and substantial manner. In the present case

that appears to have been done. No power was conferred on the defendant by the statute to remain on the spot and look after the work, and certainly no obligation is imposed on him to look after it and make good a subsidence which occurred six months after the work had been completed. Therefore the judgment of the Court of Queen's Bench was right, and must be affirmed.

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BRAMWELL B. The finding of the jury amounts to this, that the accident was attributable to a want of proper repair of the road afterwards, and not to the improper filling up of the trench.

CHANNELL B., BYLES, KEATING and SMITH JJ., concurred.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

WOODHOUSE *against* MURRAY.

Thursday,
November 26th.

[Reported ante, p. 720.]

WHITELEY, appellant, CHAPPELL, respondent.

Saturday,
November 28th.

Stat. 14 & 15 *Vict. c.* 105. s. 3. makes it an offence to "personate any person entitled to vote" at an election of guardians. A. delivered to the person appointed to collect the voting papers the voting paper of a person who was dead. Held not an offence within sect. 3.

14 & 15 *Vict.*
c. 105. s. 3.
Election of
guardian.
Personation.
Conviction.

CASE stated by the stipendiary magistrate for *Manchester* under stat. 20 & 21 *Vict. c.* 43.

At a Petty Session at *Salford*, in the county of *Lancaster*, the appellant was convicted on a complaint

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preferred against him by the respondent under stat. 14 & 15 *Vict. c. 105. s. 3.*, that on the 8th *April*, 1868, pending the election of a guardian of the poor for the township of *Bradford*, in the union of *Prestwich*, he wilfully, fraudulently and with intent to affect the result of the election, personated one *Joseph Marston* a person entitled to vote at that election.

The name of *Joseph Marston* was on the list of voters duly qualified to vote at the election of guardians for the township of *Bradford*, and the voting paper of *Joseph Marston* as a ratepayer was left by the proper officer at the shop of one *Pendlebury* and by him delivered to the appellant. *Joseph Marston* died in *December*, 1867.

The voting paper, apparently duly signed by *Joseph Marston*, was delivered by the appellant to the person appointed to collect the voting papers.

It was objected for the appellant that he did not personate any person who at the time of the election was entitled to vote, and therefore was not within the statute.

The question for the opinion of the Court was, whether the appellant was rightly convicted.

Stat. 14 & 15 *Vict. c. 105. s. 3.* "If any person, pending or after the election of any guardian or guardians, shall wilfully, fraudulently and with intent to affect the result of such election, commit any of the acts following; that is to say, personate any person entitled to vote at such election; or falsely assume to act in the name or on the behalf of any person so entitled to vote; &c., every such person so offending shall for every such offence be liable, upon conviction thereof before any two justices, to be imprisoned" for any period not exceeding three months.

Mellish (*M'Intyre* with him), for the appellant.—The present case was overlooked by the Legislature in framing sect. 3 of stat. 14 & 15 *Vict. c. 105*. The language of other statutes relating to the offence of personation is different, as stats. 31 *G. 2. c. 10. s. 24.* and 3 *G. 3. c. 16. s. 6.*, on which there is the following comment in 2 *East P. C.* 1007, “By the words of the several statutes last above referred to, the false personating must be done *in order to receive the wages, &c. of some seaman, &c. entitled or supposed to be entitled thereto*: there must therefore be some evidence to shew that there was such a person of the name and character assumed, who was either entitled, or might *primâ facie* at least be supposed to be entitled to receive on board such a ship the wages, &c. attempted to be acquired,” and *Brown's Case, Winchester Sp. Ass.* 1800, *MS.*, is cited. [He also referred to stat. 2 & 3 *W. 4. c. 53. s. 49.*, 2 *Russ. on Crimes*, ed. by *Greaves*, 1013-4.] Stat. 6 & 7 *Vict. c. 18. s. 83.* provides in terms for the personation of a dead person. Stat. 22 *Vict. c. 35. s. 9.*, on which *Reg. v. Hague (a)* was decided, has the words “whose name is on the burgess roll then in force.”

Crompton, for the respondent.—The essence of the misdemeanour under stat. 14 & 15 *Vict. c. 105. s. 3.* is the pretending to be a person entitled to vote, whether that person be living or dead. Sect. 5 may be read as if the words “supposed to be entitled to vote” were in it. In *Rex v. Martin (b)* and *Rex v. Cramp (c)* it was held that stat. 54 *G. 3. c. 93. s. 89.* applied though the seaman personated was dead. In *Reg. v. Hague (a)* the

(a) 4 *B. & S.* 715.(b) *R. & R.* 324.(c) *R. & R.* 327.

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1868. Court extended the words of stat. 22 *Vict. c. 35. s. 9.* to
 WHITELEY include a person who represented himself as another
 v. person at the place of voting, though he did not actually
 CHAPPELL. vote.

Mellish, in reply.

LUSH J. We cannot, without straining the words of stat. 14 & 15 *Vict. c. 105. s. 3.* beyond what we should be justified in doing, bring the present case within it. It is indeed to be regretted that the Legislature have not used words large enough to include the offence of personating a dead person. The words "any person entitled to vote at such election" must mean a person entitled to vote at the time when the personation takes place. In *Rex v. Martin (a)* and *Rex v. Cramp (b)* no reasons are given for the judgment, but it seems to have proceeded upon the words "supposed to be entitled" in stat. 54 *G. 3. c. 93. s. 89.*, which are not in stat. 14 & 15 *Vict. c. 105. s. 3.*

HANNEN J. I am sorry to come to the same conclusion, but dangerous consequences follow from straining the language of a statute in order to bring a case within it.

HAYES J. concurred.

Conviction quashed.

(a) *R. & R. 324.*

(b) *R. & R. 327.*

END OF MICHAELMAS VACATION.

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ATTORNEY.

I. *A.*, being in his fifteenth year, entered into the service of *C.* as *salaried* clerk in *March*, 1855, "and was continuously employed by him in the transaction and performance of various matters of business" until *March*, 1864, when he was articled for five years. Held, that he was entitled to be admitted as an attorney in *Easter Term*, 1868, under stat. 23 & 24 *Vict. c.* 127. *s.* 4., which enacts that any person who has served as clerk to an attorney for ten years, and has afterwards served under articles of clerkship for three years, may be so admitted. *In re Sherry*, 115.

II. 1. Misconduct for which the Court would either refuse or defer the admission of an attorney is ground for either striking an attorney off the roll or suspending him from practising, though the misconduct be not in his character of attorney.

2. An attorney acting as managing clerk to a firm of attorneys completed the sale of property belonging to a client of the firm, and appropriated part of the purchase money to his own use. Upon the discovery of the fraud a year afterwards he admitted the fact, and repaid the amount. Upon motion to strike him off the roll the Court suspended him from practising for one year.

3. Where an attorney charged with a criminal offence denies his guilt, the Court will not try the issue on affidavits. *In re Hill, Gentleman, one, &c.*, 481.

III. 1. Where a judgment or a verdict which is not disturbed has been obtained, and *semble*, where a debt is ascertained through the exertions of the attorney, and the parties make a collusive compromise, the Court will enforce the attorney's right of lien for his costs.

2. The compromise is collusive where the object of it is that the plaintiff should get more than he would in the ordinary course, while his attorney would get less.

3. An action for unliquidated damages was compromised by the parties after the plaintiff, who was a labourer,

had obtained a verdict for 25*l.*, and a rule nisi for a new trial had been granted on the ground that the verdict was against the evidence. Held, that the attorney had no ground for claiming the equitable interference of the Court to enforce his right of lien. *In re Sullivan v. Pearson*, 960.

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AWARD.

1. The Common Law Procedure Act, 1854, 17 & 18 *Vict. c.* 125. *s.* 15., applies to references by consent as well as those under a compulsory order.

2. The plaintiff and defendant agreed in writing, on the 8th *August*, 1866, to refer all matters in dispute between them to an arbitrator. The agreement did not limit any time for making the award. The arbitrator entered on the reference at once, but did not make his award within three months after. Afterwards a Judge made an order enlarging the time for making the award; and the plaintiff took up the award within the time so enlarged. In an action upon the award: Held that the Judge had power to make the order under The Common Law Procedure Act, 1854, 17 & 18 *Vict. c.* 125. *s.* 15., and that its effect was to ratify the act of the arbitrator; and therefore the action was maintainable.

3. *Quære*, per *Blackburn J.* If at a meeting held after the time had expired perjury were committed, whether an indictment could be maintained?

4. *Quære*. Whether the Judge's order enlarging the time must not be made before an action can be brought on the award? *Lord v. Lee*, 269.

BAIL.

1. Stat. 11 *G.* 4 & 1 *W.* 4. *c.* 70. *s.* 21., by which a defendant "held to bail upon any mesne process" may be

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rendered either to the prison of the Court out of which process issued, or to the common gaol of the county in which he was arrested, applies to arrest on a writ of *capias* to hold to bail under stat. 1 & 2 *Vict. c.* 110. *s.* 3.

2. Notwithstanding the Queen's prison is by The Queen's Prison Discontinuance Act, 1862, 25 & 26 *Vict. c.* 104., discontinued as a debtor's prison, a recognizance of bail conditioned to render the defendant "into the custody of the keeper of the Queen's prison" is sufficient, and is satisfied by a render to the gaol of the county in which he was arrested. *Mainwaring v. Milner*, 1002.

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BANKRUPT.

I. A deed of arrangement under The Bankruptcy Act, 1861, 24 & 25 *Vict. c.* 134. *s.* 192., provided for the payment in full of the costs of a previous deed of inspectorship, and all costs, charges and expenses incurred by the inspectors for the benefit of the estate, including the costs of an execution creditor, in consideration of the execution being withdrawn. Held by the Queen's Bench, and affirmed by the Exch. Ch., that the deed was valid on the grounds—

1. That the inspectors had an equitable lien for those costs on the bankrupt's estate.

2. That payment of a doubtful claim is not *ultra vires*, or alien to the payment of the debts of the debtor and his release therefrom, and the winding up of his estate. *Fitzpatrick v. Bourne*, 157.

II. A person who had taken shares in a Company incorporated and registered under The Companies Act, 1862, 25 & 26 *Vict. c.* 89., became bankrupt under The Bankruptcy Act, 1861, 24 & 25 *Vict. c.* 134. He however retained his shares, the assignees not having taken them, and the Company was subsequently wound up. Held, that he was not discharged from liability to calls made after his bankruptcy. *Mar-*

tin's Patent Anchor Company (Limited) v. Morton. Same v. Hewitt, 183.

III. 1. A composition deed between partners of a firm and the creditors of the partnership which makes no provision for creditors of the partners, is not within The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192., and therefore does not bind non-assenting joint creditors of the partnership.

2. A composition deed between *A.* and *B.*, partners, and their creditors, by which *A.* assigned to *B.* his moiety of the partnership goods, contained a proviso that if before the composition should be fully paid to the creditors *A.* should be adjudicated bankrupt or attempt to make any assignment of his estate for the benefit of his creditors, or any arrangement with them differing from that, the deed should be void. Held, that in pleading that deed it was not necessary to negative the happening of those events. *Tomlin v. Dutton, 251.*

IV. 1. If a composition deed is within the purview of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192., the Court will not overrule the decision of a statutable majority of the creditors as to the reasonableness of its clauses.

2. A composition deed between partners who carried on business as engineers, and their creditors, assigned the partnership property and their separate estates to trustees for the benefit of the creditors, with power to them to postpone the sale and conversion of the premises assigned, and to employ all or any part of the joint estate, and to carry on the business for such period as they should think fit, and to make advances out of the joint estate or the proceeds thereof, and to employ the partners or either of them to assist in carrying on the business; and it was declared that the trustees should be indemnified out of the joint and separate estate by the creditors, in proportion to the amount of their respective debts, against all transactions and personal engagements, matters and things which they should lawfully do, enter into, or order in or concerning the management or conduct

of the business. Held, that the indemnity clause imposed a personal liability on non-assenting creditors beyond the funds of the estate, and therefore the deed was not within sect. 192. *Wigfield v. Nicholson, 261.*

V. Declaration for goods sold and delivered. Plea on equitable grounds: a composition deed; with an averment that the defendants were ready and willing to pay to the plaintiffs the first instalment of the composition, but the plaintiffs refused to accept it, and discharged the defendants from paying or tendering it.

1. Held good, without payment of money into Court; and

2. *Semble*, per *Lush J.*, good as a legal plea. *Bamford v. Clewes, 539.*

VI. Declaration by drawees against acceptor of bills of exchange. Plea. A composition deed made between the defendant of the first part, a trustee of the second part, and all the creditors at the date of a recited indenture of the third part, by which, after reciting the prior deed, for which the pleaded deed was to be substituted, as agreed by all the parties to it, the defendant covenanted with the trustee and creditors respectively that if the deed was duly registered under The Bankruptcy Act, 1861, he would pay to each of the creditors a composition of 2s. in the pound by two instalments, on &c.; and it was agreed that certain premises and effects of the defendant assigned by the recited indenture should be held by the trustee in trust for the defendant until default in payment of the composition. Provided that if default should be made the trustee should sell and apply the proceeds (inter alia) "in payment rateably of the debts due to the said creditors respectively" by the said debtor; the creditors released the defendant from the debts due to them respectively: provided that in case default should be made contrary to the covenant in payment of the composition to the creditors respectively the release should be at an end, "and the creditors shall thenceforth be at liberty to sue for or prove

for the full amount of their respective debts," &c.: provided that the deed should not prevent any of the creditors from claiming or realizing any security held by them, or from suing any person other than the debtor liable for payment thereof for the recovery thereof, &c. Averment (inter alia) that all things necessary in that behalf having happened and been done the plaintiffs were bound by the deed. Replication on equitable grounds: that the deed was not executed or assented to by the plaintiffs; that when the deed was executed the defendant had available assets for the payment of a much larger composition than 2s. in the pound, that the deed was not bonâ fide executed for the equal benefit of all the creditors, but solely from motives of benevolence and kindness to the defendant, and for his sole and only benefit, and without any just regard to the rights or interests of the other creditors. On demurrer, held,

1. That the deed was an absolute release by each of the creditors of his own debt defeasible on nonpayment of the composition to him; and therefore

(1). The plea was good without alleging payment or tender of the composition to the plaintiffs.

(2). Or without alleging payment or tender of the composition to the other creditors of the defendant.

2. That it was not necessary that the amount of the composition should be brought into Court.

3. Concessum. That the deed was pleadable in bar as a release; and

4. Per Cockburn C. J. and Lush J., the circumstances stated in the replication rendered the deed not a binding deed within sect. 192, *Hannen and Hayes JJ.* assenting on the authority of *In re Cowen, ex parte Foster*, 36 L. J. Bank. 41; L. R. 2 Chanc. App. 563. *Hart v. Smith*, 543.

VII. 1. A deed between a debtor and his creditors which fairly carries out the previous assents of the creditors is sufficient under The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192. subs. 1.

2. So, if the creditors assent to a deed of composition, and the deed contains

also a release of the debtor from his debts and liabilities.

3. A memorandum on the deed in pursuance of sect. 196, stating the day and hour on which it was brought into the office of the registrar for registration, and a certificate of registration by the registrar, are primâ facie evidence of an affidavit by the debtor having been delivered, together with the deed, in pursuance of sect. 192. subs. 5. *Waddington, Executor &c., v. Roberts*, 697.

VIII. By The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 73., if execution shall be levied by seizure and sale of the goods of a trader debtor, upon judgment in an action for a debt or money demand exceeding 50l., he shall be deemed to have committed an act of bankruptcy from the date of the seizure: provided that, unless in the meantime a petition for adjudication of bankruptcy be presented, the sheriff shall proceed with the execution, and at the end of seven days after the sale pay over the proceeds to the execution creditor, who shall be entitled thereto, notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money received by the creditor shall be paid by him to the assignee under the bankruptcy. The plaintiff, trustee under a post nuptial settlement made by P., recovered judgment in an action of covenant against him, and issued a fi. fa., under which, on the 5th June, his stock in trade and machinery were seized. The plaintiff withdrew the execution on P. assigning to him all his property; P. was then in insolvent circumstances, and ceased to carry on his trade. On the 12th September P. was adjudged a bankrupt. In an action against the creditors' assignee the jury found that the transaction between P. and the plaintiff was bonâ fide. Held by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that the assignment was invalid, as being fraudulent within the bankrupt law; and that it was not an equivalent, as, if the sheriff had sold, the creditors might have obtained an adjudication in

bankruptcy within fourteen days, and then under sect. 73 the money would have been paid to the assignee in bankruptcy. *Woodhouse v. Murray*, 720.

IX. By a composition deed made between the defendants of the first part, *P. & Co.* of the second part, and all the creditors other than *P. & Co.* of the third part, the defendants covenanted to pay *P. & Co.*, with the general body of creditors, a composition of 5s. in the pound by two instalments, at four and twelve months, and the defendants and *P. & Co.* as sureties, by way of separate covenant, covenanted with the other creditors to pay them a composition of 5s. in the pound by instalments, at four and twelve months, provided that *P. & Co.* should not be liable under the covenant for a greater amount in the whole than 3000*l.* The defendants also assigned to *P. & Co.* all their stock in trade, &c., upon trust to sell and apply the proceeds (2) in payment of the composition; (3) in payment of the remaining 15s. in the pound on the debt owing to them, "in consideration of their undertaking the liability of suretyship." Provided also that, if *P. & Co.* should arrange with any creditor to make an immediate payment of the composition payable to him with a deduction by way of discount, they should be at liberty to repay themselves out of the trust premises the full amount of the composition payable to such creditor. Held, that the deed was a valid deed within The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192., inasmuch as

- (1). The trust for payment of the remaining 15s. in the pound to *P. & Co.* did not necessarily create an undue preference.
- (2). The proviso for anticipating payment of the composition to any creditor did not authorize *P. & Co.* to apply the assets inconsistently with the trusts for the creditors. *Bissell v. Jones*, 884.

X. Action by indorsee against acceptor of a bill of exchange. Plea. A composition deed registered under The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134.: the deed contained no reservation of rights against sureties. Replication. That the bill was accepted for

value and indorsed to the plaintiff for value, and that if he had assented to the deed he would have discharged the drawers. Rejoinder. That before the registration of the deed the drawers consented to the plaintiff executing and becoming bound by the deed. The issue upon the rejoinder having been found for the defendant, Held that, as by reason of such consent the plaintiff might have come in for the composition and have held the drawers liable for the balance, he was in the same position as if the right to have recourse to the drawers had been reserved to him in the deed, and therefore was bound by it. *Poole v. Willats*, 957.

BARON AND FEME.

I. In an action by the administratrix of a wife it appeared that the defendant had written letters to the wife promising to hold at her disposal a sum of money which he had received from a third person. The husband did not interfere either to allow her to have the controul of the money or to prevent her from dealing with it. He survived her, and then died. To prove the amount the plaintiff offered in evidence an examined copy of the defendant's answers to interrogatories in a previous action in which the plaintiff had sued the representative of the husband, but which was discontinued. Held,

By the Court of Queen's Bench,

1. That the answers were admissible without proof of the interrogatories.
2. That an examined copy of the answers was admissible without proof of the defendant's handwriting to the original answers.

By the Court of Queen's Bench, and affirmed in the Exchequer Chamber by *Willes* and *Smith JJ.* and *Channell* and *Cleasby BB.*, and *semble per Keating J.*, *Kelly C. B.* dissentiente,

3. That the gift of money was a chose in action conferred on the wife with which the husband did not during coverture interfere, and therefore the action was properly brought by the representative of the wife. *Fleet, administratrix, &c., v. Perrins*, 575.

II. Where a wife, living separate from

her husband in consequence of misconduct on his part rendering it improper for her to remain with him, has the custody of their child under the age of seven years against the husband's will but by force of an order made under stat. 2 & 3 Vict. c. 54., the reasonable expenses incurred in providing for it are part of the wife's reasonable expenses, for which she has by law authority to pledge her husband's credit. Per *Blackburn, Mellor and Lush JJ.*, *Cockburn C. J.* dissentiente. *Bazeley v. Forder*, 599.

See *Order of Removal*.

BASTARD CHILD.

See *Seduction*.

BEGIN.

Right to. See *Rate, General District, II.*

BILL OF EXCHANGE.

I. Stat. 17 & 18 Vict. c. 83. s. 5. requires that every bill of exchange drawn out of the *United Kingdom* shall have an adhesive stamp affixed thereon before it is presented for payment, or is paid, or indorsed, transferred or negotiated. *H. J.*, in the *Isle of Man*, being indebted to the plaintiffs in *England*, gave them the following document addressed to the defendants:—"£600. *Douglas, Isle of Man*, 13th July, 1865. On the first day of *August* next please to pay Messrs. *G. M. & G.* or order six hundred pounds sterling, on account of moneys advanced by me for *The Isle of Man Slate and Flag Company, Limited*. *H. J.* To Messrs. *H. W. & J. H.*, official liquidators of the said Company." Notice of this order was sent to the defendants in *England* before *August* 1, and the defendant *H. W.* wrote an answer promising to honour the order on the 15th *August*. On the 15th *October*, 1866, he wrote admitting that he had received money applicable to the order, but stating that he had disposed of it in other ways. The defendant *J. H.* had never authorized the acts or letters of the defendant *H. W.* In an action against both defendants, Held,

1. That, there being no evidence against *J. H.*, the misjoinder should be amended under The Common Law Pro-

cedure Act, 1852, 15 & 16 Vict. c. 76. s. 37., by striking out his name.

2. That the document was a bill of exchange.

3. That, though being drawn in the *Isle of Man* it was by stat. 19 & 20 Vict. c. 97. s. 7. to be deemed an inland bill, it was saved from the consequences of that enactment so far as stamp duties are concerned, and therefore was only liable to stamp duty under stat. 17 & 18 Vict. c. 83.

4. That it had not been presented or negotiated within the meaning of stat. 17 & 18 Vict. c. 83. s. 5., and therefore did not require to be stamped.

5. That the plaintiffs were entitled to recover in an action for money had and received the amount which the defendant *H. W.* admitted that he had received applicable to the debt of the Company to *H. J.*

6. A bill of exchange must be produced when presented for payment. *Griffin v. Weatherby*, 726.

II. A bill of exchange accepted by the defendant was indorsed to *C.*, who indorsed it in blank. A bank, being the holders of the bill at maturity, commenced actions against the defendant and *C.*, and signed judgment against the defendant on the 3rd *March*. On the 21st *March* *C.* paid the amount due on the bill to the bank, and an order was made to stay proceedings in that action on payment of costs: the costs were taxed, and the amount paid on the 13th *April*, and the bill was then delivered to *C.*, who, being indebted to the plaintiffs in a larger amount, transferred it to them. On the 29th *March* the bank charged the defendant in execution on their judgment, but on the same day discharged him on payment of the costs. Held, that the plaintiffs were entitled to sue the defendant on the bill notwithstanding his discharge by the bank; that *C.*'s right of action on the bill was vested on the 21st *March*; and that the only effect of nonpayment of the costs was that the bank had a lien upon the bill for their amount. *Woodward v. Pell*, 994.

BILL OF SALE.

Registration of. See *Mortgage, I.*

1030 BOARD OF HEALTH.

BOARD OF HEALTH.

See *Public Health*.

BOAT CLUB.

See *Rate, General District, I.*

BOROUGH.

See *Local Government Act. Penalties.*

BOUNDARY.

See *Local Government Act.*

BREACH.

Of agreement. See *Interrogatories, II.*

Of covenant. See *Covenant, I., II.*

BRIDGE.

See *Rate, Poor, I.*

BURGESS ROLL.

See *Municipal Corporation, I., II.*

CALLS.

On shares. See *Bankrupt, II.*

CANAL.

See *Rate, Poor, V.*

CARGO.

Time for discharge of. See *Contract, II.*

CARRIER.

See *Company, Railway, I., II., III.*

CASE.

Special. See *Court. Rate, General District, I.*

CAUSA CAUSANS.

See *Nuisance, II.*

CAVEAT EMPTOR.

CAVEAT EMPTOR.

See *Contract, I.*

CERTIORARI.

See *Highway, I.*

CESTUI QUI TRUST.

See *Covenant, II.*

CHARTERPARTY.

See *Contract, II.*

CHEQUE.

1. It is a custom of bankers in the city of *London* not to pay a cheque marked "post dated." Held, that this custom is part of the contract between a *London* banker and his customers, and therefore a customer could not maintain an action against his banker for refusing payment of a cheque so marked.

2. A post dated cheque payable to order is not illegal. *Emanuel v. Roberts*, 121.

CHILD.

See *Baron and Feme, II. Seduction.*

CHOSE IN ACTION.

See *Baron and Feme, I.*

CHURCH.

The perpetual curate of a benefice has a right to the possession of the church and churchyard so far as is necessary for the performance of his sacred functions, but no farther, and therefore has no right to prevent the lay rector or persons claiming under him from depasturing by sheep the grass in the churchyard: and the law in this respect is not affected by stat. 1 G. 1. st. 2. c. 10. *Greenlade v. Darby*, 428.

See *Metropolis Management Act, I.*

CHURCHYARD.

See *Church*.

CLAIM.

Of easement. See *Nuisance*, I.

Of toll. See *Prescription*.

CLERK.

Of attorney. See *Attorney*, II.

COAL MINE.

By stat. 23 & 24 *Vict.* c. 151. s. 10. rule 1., "an adequate amount of ventilation shall be constantly produced in all coal mines or collieries and ironstone mines to dilute and render harmless noxious gases to such an extent that the working places of the pits, levels, and workings of every such colliery and mine, and the travelling roads to and from such working places, shall, under ordinary circumstances, be in a fit state for working and passing therein." Held, that rule 1 was not confined to the ventilation of the working places and travelling roads, but required that so much of the mine must be kept ventilated as to render the working places and travelling roads safe. *Brough*, appt., *Homfray and others*, respts., 492.

COLLUSION.

See *Attorney*, III.

COLONY.

I. Stats. 11 & 12 *W.* 3. c. 12. and 42 *G.* 3. c. 85. s. 1. enact that offences committed out of *Great Britain* by governors of colonies, &c. in the execution, or under colour, or in exercise of their offices, may be prosecuted or inquired of, heard and determined in the Court of King's Bench, either upon information by the Attorney General, or upon indictment, and the offence may be laid to have been committed in *Middlesex*. By stat. 11 & 12 *Vict.* c. 42. s. 2., in all cases of offences committed on land beyond the seas for which an indictment

may legally be preferred in any place within *England* or *Wales*, justices may issue their warrant to apprehend the person charged; and sect. 20 empowers them to bind by recognizance the prosecutor and witnesses to appear at the next Court of oyer and terminer or gaol delivery, and the recognizances and depositions shall be delivered to the proper officer of the Court in which the trial is to be had. Sect. 25 directs the committal of the accused party to the common gaol of the county, &c. within which the justices have jurisdiction. A Metropolitan Police Magistrate having declined to hear a charge preferred against *E.* under stats. 11 & 12 *W.* 3. c. 12. and 42 *G.* 3. c. 85. s. 1.; Held,

1. That the application to the Court should be for a mandamus to the magistrate to hear the evidence and not for a rule under stat. 11 & 12 *Vict.* c. 44. s. 5.

2. That the powers given to justices by stat. 11 & 12 *Vict.* c. 42. ss. 2. 20. applied to offences committed under stats. 11 & 12 *W.* 3. c. 12. and 42 *G.* 3. c. 85. *The Queen v. Vaughan and Eyre*, 329.

II. 1. Wrongful acts committed in a colony, which has a local legislature with plenary power of legislation subject to the assent of the Sovereign, are protected against subsequent legal proceedings in *English* Courts by an ex post facto Act of indemnity passed in the colony.

2. The governor of such a colony may give his official consent to a legislative measure there in which he is individually interested.

3. *Quære*, whether in the case of an act done abroad, in order to found an action before an *English* Court, the act must be tortious according to the law of the particular country as well as of this; or whether the act, if unlawful by the *lex loci*, must give a claim to damages by the latter as well as by the law of this country, in order to give a right to damages here. *Phillips v. Eyre*, 343.

COMMISSIONERS.

For building churches. See *Metropolis Management Act*, I.

For *English fisheries*. See *Salmon Fishery*, II.

Of Works and Public Buildings. See *Rate, Poor*, I.

Under local Act. See *Public Health*.

COMMON LAW PROCEDURE ACT.

1852. See *Bill of Exchange*, I. *Slander. Writ of Summons*.

1854. See *Award. Interrogatories*.

COMPANIES ACT.

The Companies Act, 1862, 25 & 26 Vict. c. 89. s. 153., enacts that where a Company is being wound up by the Court or subject to the supervision of the Court every transfer of shares made between the commencement of the winding up and the order for winding up shall, unless the Court otherwise orders, be void. Held,

1. That a contract for the sale of shares might be made in that interval, and a transfer of them registered after the order for winding up.

2. That as the vendor remains on the list of contributories settled at the time of the order for winding up, such a contract might be made upon the terms that he should be indemnified by the purchaser against future calls.

3. On a contract for the sale of shares it is not necessary that the vendor himself should transfer them.

4. After a Company had been ordered to be wound up, the plaintiff and defendant executed a deed, by which the plaintiff transferred and the defendant agreed to accept shares subject to the conditions on which the plaintiff then held them. To an action upon this deed the defendant pleaded that before the making of the deed a resolution of the Company had been passed for winding up the Company voluntarily, and a petition had been presented to the Court of Chancery for winding it up under the supervision of the Court, and the winding up had commenced, and the plaintiff knew of the resolution and of the commencement of the winding up, but the defendant was ignorant of them; that no sanction of the Court or

of the official liquidator or order of the Court as to the sale or transfer of the shares had been obtained or made; that at the time of the making of the deed the plaintiff was not a member of the Company, nor registered as such, of which the defendant was ignorant; that the defendant had not been registered or made a member of the Company, and there had been no default on the part of the Company in omitting his name from the register, and that the defendant never made any express agreement to pay or indemnify the plaintiff against any calls made upon the shares. On demurrer, held that the plea was bad, inasmuch as

(1). It was not alleged that the plaintiff was aware of the defendant's ignorance of the petition, &c.

(2). The sanction of the Court for the sale of the shares was not required.

(3). The fact of the plaintiff not being a member of the Company, and the defendant's ignorance of that fact, could only affect the damages.

(4). The plea did not negative circumstances from which a contract to indemnify might be inferred. *Rudge v. Bowman*, 864.

See *Bankrupt*, II.

COMPANY.

Canal. See *Rate, Poor*, V.

Joint Stock.

T., the registered holder of five shares in a joint stock Company, limited, deposited the share certificates with a stockbroker. A forged transfer of the shares to S. and G. having been left with the secretary of the Company for registration, together with the share certificates, he, in accordance with the usual custom of business, registered the transfer and removed the name of T. from, and placed the names of S. and G. upon the register as holders of the shares, and share certificates were handed to them. B. and G. having, through their broker, bought on the Stock Exchange five shares in the Company, S. and G. transferred the shares comprised in the forged transfer to B. and G. respectively, and they were re-

gistered as the holders of the shares, and share certificates were handed to them. Upon application to the Court under The Companies Act, 1862, 25 & 26 *Vict. c. 89. s. 35.*, it was ordered that the name of *T.* be restored to the register, and a special case be stated between *B.* and *G.* and the Company for determining the amount of damages (if any) which the Company were liable to pay them. *Held*,

(1). That the Company, by giving the certificates, represented that *S.* and *G.* were the lawful holders of the shares mentioned in them, intending that persons purchasing the shares should act thereon, and that, *B.* and *G.* having *bonâ fide* acted upon that representation, the Company were estopped from denying the truth of it.

(2). That *B.* and *G.* were entitled to recover from the Company the value of the shares at the time the Company refused to recognise them as shareholders, with interest at 4 per cent.

(3). *Quære.* Whether the Company had a remedy over against *S.* and *G.*? *In re the Bahia and San Francisco Railway Company, Limited, and Amélie Trittin.* *In re the Recife and San Francisco Pernambuco Railway Company, Limited, and Amélie Trittin*, 844.

See *Bankrupt*, II.

Railway.

I. Railway Companies who undertake to carry passengers for hire, although bound to use the utmost care, skill and vigilance in everything that concerns the safety of the passengers, do not *warrant* the roadworthiness of the carriages they employ, and consequently are not responsible for an accident to a passenger arising from a latent defect in the wheel of one of their carriages, such as no care or skill could detect. By the Exchequer Chamber, affirming the judgment of the Queen's Bench. *Redhead v. The Midland Railway Company*, 519.

II. 1. The Railways Clauses Consolidation Act, 1845, 8 & 9 *Vict. c. 20. s. 68.*, imposes an absolute obligation on railway Companies as between them and

the owners and occupiers of adjoining lands, but not as between them and their passengers, to make and maintain fences to prevent cattle straying on the line.

2. A railway Company, although bound to take reasonable care that the fences are sufficient to keep cattle from straying on the line, do not warrant to their passengers that the fences are such.

3. Where a person purchases a ticket from one railway Company for a journey part of which is on the line of another railway Company, and is injured by an accident to the train while passing on the latter line, occasioned by cattle escaping from adjoining land owing to a defect in the fence, the former Company are liable for negligence of the other Company in respect of the fence. *Buxton v. The North Eastern Railway Company*, 824.

III. Stat. 2 & 3 *W. 4. c. xlviii.*, reciting that a railway "for the passage of waggons, engines, and other carriages," would facilitate the conveyance of coals and other heavy articles to certain slate quarries, and of slates, copper and other ores to the sea side, and would otherwise be of great public utility, empowered a Company to make and maintain a railway "passable for waggons and other carriages," and to erect and set up (inter alia) fire engines or other machines, and to do all other matters and things fit or necessary for the making and using the railway. While one of the Company's trains, carrying passengers in accordance with a certificate of the Board of Trade, and drawn by a steam locomotive engine, was passing along the line sparks from the engine were emitted and blown towards a haystack, which took fire and was burnt. *Held*, that the Company had not statutory authority to use locomotive engines, and therefore were liable to an action for the damage notwithstanding all reasonable precautions had been taken by them to prevent the emission of sparks. *Jones v. The Festiniog Railway Company*, 835.

IV. A yearly tenant of a public house received from a railway Company a

notice to treat under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. s. 18., and a notice in pursuance of their Act of their intention at the expiration of six months to take the premises. He sent in his particulars of claim, and, the Company not taking possession at the expiration of six months, continued to carry on his business on the premises for two years at a reduced rate of profits, the Company having, by virtue of their powers, destroyed the surrounding neighbourhood. At the end of that time he was served with a summons to attend before a Metropolitan police magistrate, under s. 121., for the purpose of having the amount of compensation for his interest in the premises assessed. Held,

1. That he was not entitled to compensation for the depreciation in value of his interest in the premises in consequence of the execution of the works of the Company destroying the neighbourhood.

2. Nor for the loss of trade profits since the notice to treat. *Reg. v. Vaughan, and the Metropolitan District Railway Company*, 892.

See *Public Health*.

Trading. See *Companies Act*.

Water. See *Nuisance*, II.

COMPENSATION.

Under Lands Clauses Consolidation Act. See *Company, Railway*, IV.

COMPOSITION

Deed. See *Bankrupt*, III., IV., V., VI., VII., X.

Musical. See *Copyright*.

COMPROMISE.

Of action. See *Attorney*, III

COMPUTATION.

Of time. See *Writ of Summons*.

CONDITIONS OF SALE.

See *Vendor and Purchaser*.

CONTRACT.

CONTRACT.

I. 1. In every contract to supply goods of a specified description which the buyer has no opportunity to inspect, they must not only in fact answer the specific description, but must also be saleable or merchantable under that description.

2. *Semble*, that the maxim caveat emptor does not apply where there has been no opportunity of inspection, or that opportunity has not been waived.

3. The plaintiffs, through their brokers, entered into a contract with the defendant for the purchase of a quantity of *Manilla* hemp to arrive at *Liverpool* from *Singapore* by four named ships. The ships arrived with the respective numbers of bales of hemp, with marks corresponding to those specified in the contract, and they were delivered to the plaintiffs and the price was paid. On examination of the bales they were found in such a state as to afford strong evidence that they had at some time, probably from a shipwreck when on the voyage from *Manilla* to *Singapore*, been wetted through with salt water, had afterwards been unpacked and dried, and then repacked in the bales and shipped at *Singapore*. The hemp was not damaged to such an extent as to make it lose the character of hemp. If in good condition it would have been what is called fair current *Manilla* hemp. The plaintiffs sold the hemp by auction as "*Manilla* hemp with all faults," and it realised 75 per cent. of the price which similar hemp would have fetched if undamaged. Held,

(1). That an action would lie against the defendant for breach of contract, as it was an implied term of the contract that the hemp should be *Manilla* hemp, and in a reasonably merchantable condition.

(2). That the measure of damages was the difference between what the hemp was worth when it arrived and what the same hemp would have realised if it had been shipped in the state in which it ought to have been shipped.

4. The Mercantile Law Amendment Act, *Scotland*, 1856, 19 & 20 Vict. c.

60. s. 5., only declares that a seller of goods without knowledge that they are defective or of bad quality shall not be held to have warranted their quality or sufficiency. *Jones v. Just*, 141.

II. 1. Whenever a party to a contract undertakes to do some particular act the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time.

2. Where the act to be done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, the law implies that each contracts that he shall use reasonable diligence in performing his part.

3. The contract implied by the law in the absence of any stipulation in a charterparty is, that each party shall use reasonable diligence in performing his part of the delivery of the cargo at the port of discharge, the merchant being ready to receive in the usual manner and the owner by his captain and crew to deliver in the usual manner.

4. A charterparty for a voyage from *Liverpool* to *Lima* or *Valparaiso* provided that the vessel should proceed to the port of discharge, or as near as she could safely get, and there deliver her cargo in the usual and customary manner. A specified number of days were agreed upon for loading the vessel at *Liverpool*, but there was no such agreement as to the discharge at her port of destination. The vessel arrived at the port of discharge and remained discharging till, owing to apprehension of a bombardment by a hostile fleet, the authorities suspended all landing of goods for seven days, after which she returned and her discharge was completed. Held, that there was no implied contract that the cargo should be discharged within the number of days usual and customary in the port for such a vessel, and therefore the loss from the delay occasioned by the extraordinary and unforeseen state of things existing at the time of discharge must

fall on the shipowner. *Ford v. Cotesworth*, 559.

III. By bought and sold notes signed by brokers acting both for the plaintiff and the defendant, the last of which was dated *April* 25th, the plaintiff bought of the defendant 500 tons of iron, the delivery to extend over three months. None of the iron was delivered by the 25th *July*. A correspondence ensued between the brokers and the defendant's agent until *February* following, from which a jury might properly come to the conclusion that the plaintiff waited for the delivery of the iron at the request of the defendant; he then went into the market and bought, the price of iron being higher than at the end of *July*. Held that, as the plaintiff had not bound himself to wait, there was no alteration of the contract within the Statute of Frauds, 29 *Car.* 2. c. 3. s. 17., and therefore in an action for breach of contract he might recover from the defendant the difference between the contract price of the iron and the market price in *February*. *Ogle v. Earl Vane*, 182.

See *Companies Act. Infancy*.

For sale of real property. See *Vendor and Purchaser*.

CONTRACTOR.

Responsibility of. See *Metropolis Management Act*, II.

COPYRIGHT.

I. 1. The pianoforte score of an already existing opera, whether arranged by the composer himself or by another person, is the subject of copyright within stats. 5 & 6 *Vict.* c. 45. and 7 & 8 *Vict.* c. 12.

2. In registering the pianoforte score of an opera pursuant to stat. 7 & 8 *Vict.* c. 12. s. 6., it is not correct to insert as the author of it the name of the composer of the opera. *Wood v. Boosey on appeal*, 175.

II. In proceedings taken under stat. 25 & 26 *Vict.* c. 68., held:

1036 CORPORATE PROPERTY.

1. The object of the statute is that enough is stated in the register of copy-right to identify the picture, &c., and whether the description of the subject-matter is sufficient for this purpose is a question of fact for the tribunal.

2. It is no defence under this Act that the copy was made or sold, &c., under a bonâ fide belief that the consent of the proprietor had been obtained, though it is ground for the infliction of a merely nominal penalty.

3. It is immaterial whether the copy of a painting, drawing, or photograph, as the case may be, is made by means of a painting, or of a drawing, or of a photograph.

4. If the design of a picture, &c., is made in violation of the statute, it is immaterial whether this is done directly from the original, or indirectly through the medium of a copy.

5. The sale of every copy made in violation of the Act is the subject of a distinct penalty, although there is only one sale. *Ex parte Beal, in re Beal v. Graves*, 395.

CORPORATE PROPERTY.

See *Rate, Poor*, II.

CORPORATION.

See *Municipal Corporation. Rate, Poor*, II.

COSTS.

Of action. See *Attorney*, III. *Bill of Exchange*, II. *County Court*, III., IV., VI., VII., VIII. *Formd pauperis*.

Of appeal against Commissioners. See *Salmon Fishery*, II.

Of indictment. See *Highway*, I.

Of maintenance of pauper. See *Lunatic*, II.

COUNCILLOR.

Town. See *Municipal Corporation*, I., II.

COUNTY.

COUNTY.

Court. See *County Court*.

Gaol. See *Lunatic*, II.

Justices. See *Lunatic*, II. *Penalties*.

Treasurer. See *Penalties*.

COUNTY COURT.

I. By stat. 13 & 14 *Vict. c. 61. s. 14.* an appeal is given from the determination of the County Court, provided the party appealing shall, within ten days after the determination, give notice of appeal to the other party, and also give security, to be approved by the clerk of the Court for the costs of the appeal. By rule 134 of the Rules and Orders for regulating the Practice of the County Courts, &c., 1857, where a party proposes to give a bond by way of security he shall serve on the opposite party and the Registrar notice of the proposed sureties, and the Registrar shall forthwith give notice to both parties of the day and hour for the execution of the bond, and state in the notice to the obligee that he must then make objection to the sureties. Held that, where an appellant has done all he can do to give security within the ten days, and the delay in doing so is caused by the registrar or respondent, there is a sufficient compliance with sect. 14 and rule 134. *Waterton v. Baker, Field*, claimant, 23.

II. The County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 10.*, by which actions for malicious prosecution and other actions of tort may be stayed or remitted for trial to a County Court unless the plaintiff give security for costs or satisfy the Judge that he has a cause of action fit to be prosecuted in the superior Court, applies to an action commenced before the passing of the Act. *Kimbray v. Draper*, 80.

III. 1. The distance at which the

defendant resides from the plaintiff when the action is brought is not alone a ground for granting costs under The County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 5.

2. The plaintiff, who resided at *Edinburgh*, sued the defendant, who resided in *London*, for wine sold and delivered to him not to be dealt with in the way of his trade, and judgment was signed by default. The costs were less than if an action had been brought in the County Court. Application for costs refused. *Thompson v. Dallas*, 193.

IV. 1. *Quere*, whether sect. 5 of The County Courts Act, 1867, 30 & 31 Vict. c. 142., was intended to apply to actions which cannot be brought in a County Court?

2. If it was so intended the Court or a Judge has power under that section to allow the plaintiff in such actions his costs, though the sum recovered does not exceed 10*l.*, and the Judge declines to certify that there was sufficient reason for bringing the action in the superior Court. *Grey v. West*, 196.

V. The County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 10., enacts that in actions of tort brought in a superior Court "a Judge of the Court in which the action is brought" may make an order that unless the plaintiff give security for costs or satisfy the Judge that he has a cause of action fit to be prosecuted in the superior Court proceedings shall be stayed or the cause be remitted for trial before a County Court. A Judge of the Common Pleas made an order under that section that actions for an irregular execution under County Court process brought in this Court against the registrar of the County Court and the plaintiff in the original action should be remitted to be tried in the County Court. Held,

1. That the order might be made by a Judge of one of the other Courts sitting at Chambers under stats. 11 G. 4 & 1 W. 4. c. 70. s. 4. and 1 & 2 Vict. c. 45. s. 1.

2. That the order was subject to be reviewed by this Court.

3. That the action was properly remitted for trial before a County Court,

but the order was varied as to the County Court in which the trial should be. *Owens v. Woosman. Owens v. Jones*, 243.

VI. The plaintiff commenced an action of trespass before the 20th August, 1867, on which day The County Courts Act, 1867, 30 & 31 Vict. c. 142., received the Royal assent, and recovered at the Summer Assizes a verdict for less than 5*l.*; but title to land came in question. The Judge before whom the cause was tried did not certify on the record for costs under stat. 13 & 14 Vict. c. 61. s. 12., nor did the plaintiff obtain an order from a Judge for that purpose under stat. 15 & 16 Vict. c. 54. s. 4. before the 1st January, 1868. On that day stat. 30 & 31 Vict. c. 142. came into operation, by which stat. 13 & 14 Vict. c. 61. s. 12. and 15 & 16 Vict. c. 54. s. 4. were repealed. Held,

1. That the plaintiff having, under stat. 13 & 14 Vict. c. 61. ss. 11. 12., become entitled to judgment for the amount of the verdict and no costs unless he obtained an order under stat. 15 & 16 Vict. c. 54. s. 4., the repeal of these statutes did not enable him to sign judgment for costs under the Statute of *Gloucester*, 6 Edw. 1. c. 1.

2. That stat. 15 & 16 Vict. c. 54. s. 4. being repealed, the Court had no power to make an order for costs.

3. *Semble*, that stat. 13 & 14 Vict. c. 61. s. 11. was a repeal of the Statute of *Gloucester* as to those actions commenced after the passing of that Act to which it was applicable, and the repeal of stat. 13 & 14 Vict. c. 61. s. 11. by stat. 30 & 31 Vict. c. 142. s. 33. did not revive the Statute of *Gloucester* as to those actions; and therefore if the plaintiff had not been in a condition to sign judgment till after the repeal of stat. 13 & 14 Vict. c. 61. s. 11. he would not be entitled to judgment for his costs.

4. *Restall v. The London and South Western Railway Company*, 37 L. J. Exch. 89; L. R. 3 Exch. 141, departed from; *Morgan v. Thorne*, 7 M. & W. 400, followed. *Butcher v. Henderson*, 403.

VII. 1. The Statute of *Gloucester*, 6 Edw. 1. c. 1., is revived by the repeal in

stat. 30 & 31 *Vict. c. 142.* of the restrictive provisions as to costs in previous County Courts Acts.

2. An action of contract was commenced in this Court before the passing of stat. 30 & 31 *Vict. c. 142.*, under circumstances in which by stat. 9 & 10 *Vict. c. 95. s. 128.* the Superior Courts had concurrent jurisdiction with the County Court. It was tried after the Act came into operation, and a verdict given for the plaintiff for less than 20*l.*: held that he was entitled to his costs under the Statute of *Gloucester, 6 Edw. 1. c. 1.*

3 *Mount v. Taylor, 37 L. J. C. P. 325; L. R. 3 C. P. 645*, upheld by this Court. *Levy v. Sanderson, 410.*

VIII. 1. Per *Lush and Hayes JJ.* In cases where there is neither exclusive nor concurrent jurisdiction in the superior Courts, nor any ground for obtaining a Judge's certificate for costs, the Statute of *Gloucester, 6 Edw. 1. c. 1.*, is repealed by the provisions in the County Courts Act, 9 & 10 *Vict. c. 95. s. 129.*, 13 & 14 *Vict. c. 61. ss. 11. 12.*, 15 & 16 *Vict. c. 54. s. 4.*, which prevented the plaintiff from obtaining his costs in any way; and is not revived as to such cases by The County Courts Act, 1867, 30 & 31 *Vict. c. 142.*, which repealed those provisions as to costs.

2. Per *Hannen J.*, and *semble per Cockburn C. J.* The effect of repealing the enactments in the County Courts Acts, which empowered the Court or a Judge to order that the plaintiff should recover his costs, and which imposed a condition on the obtaining them, was to leave the plaintiff in the position in which he was before the existence of the repealed enactments, that is, entitled to recover his costs under the Statute of *Gloucester.*

3. An action for goods sold was commenced before the passing of The County Courts Act, 1867, 30 & 31 *Vict. c. 142.*, and was by order of a Judge tried in the County Court after that Act came into operation, and a verdict obtained for 15*l. 2s.*: there was neither exclusive nor concurrent jurisdiction in the superior Courts, nor any ground for obtaining a Judge's certi-

ificate for costs. Held, per *Lush and Hayes JJ.*, that the plaintiff was not entitled to costs; per *Hannen J.*, and *semble per Cockburn C. J.* that he was. *Mirfin v. Attwood, 414.*

IX. By the County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 11.*, "all actions of ejectment, where neither the value of the lands, &c., nor the rent payable in respect thereof," exceeds 20*l.* by the year, may be brought in the County Court. Held,

1. That the test of the jurisdiction of the County Court is the value or rent as between the litigant parties, and not the value or rent as between the lessee and a sublessee.

2. That where a County Court Judge had decided that the annual value did not exceed 20*l.*, and there was evidence to support his decision, this Court could not grant a prohibition; per *Cockburn C. J.* and *Lush J.*, *Hannen J. hæsitante.* *In re Brown v. Cocking, 503.*

X. By the County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 11.*, "All actions of ejectment where neither the value of the lands, &c., nor the rent payable in respect thereof, shall exceed the sum of 20*l.* by the year," may be brought in the County Court. In ejectment against the occupier by the assignee of a term subject to a ground rent, the County Court Judge was of opinion that by deducting the ground rent the annual value of the premises was reduced below 20*l.*, and therefore he had jurisdiction. Held,

1. That the value intended in sect. 11 is the marketable value of which the rent paid by the tenant to the immediate landlord is, in the absence of exceptional circumstances, a fair criterion.

2. That, the County Court Judge having adopted an erroneous test of value, this Court would grant prohibition. *In re Elstone v. Rose, 509.*

XI. The County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 13.*, allows, with the leave of the Judge, an appeal from the decision of a County Court in actions in which an appeal was not before allowed. By sect. 25 the words

"County Court" include the Courts held by virtue of the *London (City) Small Debts Extension Act, 1852, 15 & 16 Vict. c. lxxvii.* By sect. 8 of the latter Act, in case of illness or absence, the Judge may appoint a deputy. An action in which there could not have been an appeal before stat. 30 & 31 *Vict. c. 142.* was tried in the Sheriffs' Court by a deputy of the Judge in his absence, who took time to consider: the Judge on his return in *August, 1867*, read the decision of his deputy, but, in order to give the defendants power of appealing, postponed the formal delivery of judgment until the 1st *January* following, when he delivered judgment and gave leave to appeal, and, the parties not agreeing, a case was stated by the deputy and signed by the Judge. Held,

1. That the judgment of the deputy was the judgment of the Court, and the postponement of its formal delivery made it a judgment of the 1st *January, 1867.*

2. That stat. 30 & 31 *Vict. c. 142. s. 13.* affected procedure, and not the rights of the parties, and therefore was retrospective, and gave an appeal in this action. *Rathbone and others, appellants, Munn, respondent, 708.*

Jurisdiction of. See *Merchant Shipping Act, II.*

Rules and orders for regulating the practice of. See *supra, I. Merchant Shipping Act, II.*

COURT.

By stat. 20 & 21 *Vict. c. 43. s. 2.,* a party appealing from the determination of justices shall, within three days after receiving the case, transmit it to the superior Court. A case was received by the appellant on *Good Friday*, who transmitted it to the Court on the following *Wednesday.* Held that, the offices of the Court being closed until *Wednesday,* the case was duly transmitted. *In re Mayor, appellant, Harding, respondent, 27, note (a).*

Of oyer and terminer. See *Colony, I.*

Of Quarter Sessions. See *Quarter Sessions.*

COVENANT.

I. The first count of the declaration was upon a covenant in a lease that the lessees and their assigns would maintain and keep in repair the forge and buildings demised and all buildings which should be erected during the demise, and all additions and improvements thereto, and would maintain and keep in good working order the fixtures, steam engines, &c., tools, utensils, and other articles demised, and also which might during the demise be brought or set up on the premises, and would replace and make good all such fixtures, engines, &c., tools, utensils, and other articles as should be broken or worn out. The second count was upon a covenant that neither the lessees nor their assigns would assign or part with the possession of the demised premises without the consent in writing of the lessor.

As to the first count.

Held. 1. That so much of the covenant as related to buildings and to machinery, tools and utensils, which were tenant's fixtures, ran with the land. But,

2. That so much of it as related to tools and utensils, which were not fixtures, did not run with the land.

3. That the assignee was not liable on this count for breaches of the covenant after an assignment by him without the consent of the lessor.

As to the second count.

Held. 4. That the covenant ran with the land and bound an assignee to whom the premises had been assigned with the consent of the lessor.

5. That the lessor could recover damages indirectly in respect of those breaches of covenant which had already occurred, and future breaches; the measure of the damages being such a sum as would, so far as money could, put the plaintiff in the same position as if he had retained the liability of the defendant instead of having an inferior remedy against a person less able to perform the covenants or compensate for breaches of them. *Williams v. Earle, 740.*

II. A lease of premises for fourteen
B. & s.

years contained a covenant by the lessees, not expressed to be on behalf of their assigns, not to assign or part with the possession without the written consent of the landlord. The landlord, by a letter addressed to the lessees, assented to a transfer of the lease to *W.* on the same terms as those on which they held it. *W.* entered into possession without any formal assignment, and afterwards by the written licence of the landlord assigned to trustees for *W.*'s creditors, who, without the consent of the landlord, sold the term to the defendant. In ejectment on the ground of forfeiture,

1. *Quære*, whether the covenant ran with the land?

2. The covenant was not broken by the lessees parting with the possession to *W.* without executing a transfer of the lease.

3. The unlicensed parting with the possession by the trustees of *W.* to the defendant was not a breach of covenant by the lessees. *West v. Dobb*, 755.

CREDITORS.

Joint. See *Bankrupt*, III.

CROSS REMAINDERS.

See *Devise*.

CROWN.

See *Rate, Poor*, I.

CURATE.

See *Church*.

CUSTOM.

See *Marriage Fee*.

Of London bankers. See *Cheque*.

DAMAGE.

From sparks. See *Company, Railway*, III.

DAMAGES.

See *Covenant*, I. *Interrogatories*, II. *Seduction. Vendor and Purchaser*, I.

DEDICATION.

Measure of. See *Contract*, I., III. *Covenant*, I.

DEDICATION.

Of highway. See *Prescription*.

DEED.

Of arrangement. See *Bankrupt*, I.

Of composition. See *Bankrupt*, III., IV., V., VI., VII., IX., X.

Of inspectorship. See *Bankrupt*, I.

Of mortgage. See *Mortgage*.

Of transfer. See *Companies Act*.

DEPUTY.

Of Judge. See *County Court*, XI.

DEVISE.

Devise of one moiety of an estate to three nephews in equal shares in tail, "and in default of such issue of any of them" to *A. B.* in fee. Held, that cross remainders were to be implied. *Powell v. Howells*, 704.

DISQUALIFICATION.

Of candidate. See *Municipal Corporation*, IV.

DISTRESS.

Right of. See *Mortgage*, I.

DISTRICT.

See *Rate, Poor*, IV.

DOUBTFUL CLAIM.

Payment of. See *Bankrupt*, I.

DRAIN.

DRAINAGE.

} See *Nuisance*, I.

EASEMENT.

See *Nuisance*, I.

ECCLESIASTICAL DUES.

FEE.

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ECCLESIASTICAL DUES.

See *Rate, Poor*, IV.

ELECTION

Of town councillor. See *Municipal Corporation*, II., III., IV.

Of guardian of poor. See *Personation*.

EJECTMENT.

See *County Court*, IX. X. *Interrogatories*, I.

EQUITABLE.

Lien. See *Bankrupt*, I.

Owner. See *Notice to quit*.

EQUIVALENT.

See *Bankrupt*, VIII.

EVIDENCE.

See *Bankrupt*, VII. *Baron and Feme*, I. *Marriage Fee*.

ESTOPPEL.

See *Company, Joint Stock. Mortgage*, I.

EX POST FACTO.

Legislation. See *Colony*, II.

FACTORY.

By stat. 7 & 8 Vict. c. 15. s. 22., if any accident shall occur in a factory which shall cause bodily injury to any person employed therein of such a nature as to prevent him from returning to his work in the factory before nine o'clock the following morning, the occupier of the factory, &c., shall within twenty-four hours of such absence send notice to the certifying surgeon of the district. Held,

1. That a returning to the factory before 9 a.m. on the following morning without the capacity to work, and soon afterwards leaving, was not "returning to work" within the section.

2. That every accident causing bodily injury, whether connected with the machinery or not, is within the section. *Lakeman*, appt., *Stephenson*, respt., 53.

FEE.

For marriage. See *Marriage Fee*.

FENCES.

See *Company, Railway*, II.

FOREIGN BILL.

See *Bill of Exchange*, I.

FORMA PAUPERIS.

An order for suing in formâ pauperis takes effect only from the time when it is served on the defendant or otherwise brought to his knowledge, and therefore a defendant who succeeds is entitled to his costs incurred before that time. *Fray v. Voules*, 60.

FISHING MILL DAM.

See *Salmon Fishery*, II.

FRAUDS.

Statute of. See *Contract*, III.

FIXED ENGINE.

See *Salmon Fishery*, III.

FIXTURES.

See *Covenant*, I.

GAOL.

See *Lunatic*, II.

GENERAL DISTRICT RATE.

See *Rate*.

GOODS.

Non-delivery of. See *Contract*, III.

GOVERNOR.

Of colony. See *Colony*.

GRANT.

See *Prescription*.

GUARDIAN.

Of poor. See *Personation*.

HAMLET.

See *Rate, Poor*, IV.

HEALTH.

Board of. See *Public Health*. *Quo Warranto*.

HIGHWAY.

I. 1. An indictment against a township for non-repair of a highway directed by justices of the peace under stat. 5 & 6 IV. 4. c. 50. s. 95. (the subsequent stat. 25 & 26 Vict. c. 61. not having been adopted in the district), was removed into the Queen's Bench by certiorari obtained by the defendants. The case was tried at the Assizes and the defendants acquitted. Held, overruling *Reg. v. The Inhabitants of Ear-disland*, 3 E. & B 960, that the Judge by whom the case was tried could not under that section award costs to the prosecutor.

2. *Quære*, whether, where an indictment under that section is not removed by certiorari, the Judge can refuse to allow costs where the party prosecuting is himself the wrongdoer, as being bound *ratione tenuræ* to repair the highway? *The Queen v. The Inhabitants of Ipstones*, 106.

II. Permitting animals to lie about a highway, either with or without a keeper, is an offence within The Highway Act, 1864, 27 & 28 Vict. c. 101. s. 25. *Lawrence*, appt., King, respt., 325.

Dedication of. See *Prescription*.

Nuisance in. See *Nuisance*, II.

See *Turnpike Road*.

HUSBAND.

See *Baron and Feme*.

IMMEMORIAL.

IMMEMORIAL.

Payment. See *Marriage Fee*. *Prescription*.

IMPLIED.

Term. See *Contract*, I.

Warranty. See *Company, Railway*, I., II.

INACCURATE.

Description. See *Municipal Corporation*, II.

INCLOSURE ACT.

See *Rate, Poor*, IV.

INDICTMENT.

See *Highway*.

INDORSEE.

See *Bankrupt*, X. *Bill of Exchange*, II.

INFANCY.

The defendant having been supplied with goods during infancy was, after full age, furnished with an account of the items and prices, at the foot of which was the following memorandum, which he signed: "Particulars of account to end of year 1867, amounting to 162*l.* 11*s.* 6*d.*, I certify to be correct and satisfactory." Held not a ratification within stat. 9 G. 4. c. 14. s. 6. to support a count either for goods sold or upon an account stated. *Rowe v. Hopwood*, 881.

INNUENDO.

See *Slander*.

INSANITY.

See *Lunatic*, I., II.

INTERROGATORIES.

I. 1. In ejectment on the title, the Court will allow the defendant to exhibit interrogatories to the plaintiff as to the links through which he claims to be heir; and this both at common law

INSPECTORSHIP.

and under The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. s. 51.

2. *Semble*, however, that the plaintiff will not be allowed to exhibit similar interrogatories to the defendant.

3. *Flitcroft v. Fletcher*, 11 Exch. 543, recognized as law. *Kettlewell v. Dyson*, 300.

II. 1. Per Cockburn C. J. In allowing interrogatories under The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. s. 51., a Court of common law is not confined within the same limits as a Court of equity on a bill of discovery.

2. In an action for breach of an agreement to deliver up bills of exchange of a certain Company, the Court allowed the defendant to administer interrogatories to the plaintiff as to the solvency of the Company and the amount of damage which he had sustained by reason of the non-delivery of the bills. *Dobson v. Richardson*, 516.

See *Baron and Feme*, I.

INSPECTORSHIP.

Deed of. See *Bankrupt*, I.

ISLE OF MAN.

See *Bill of Exchange*, I.

JOINT.

Creditors. See *Bankrupt*, III.

Stock Company. See *Company, Joint Stock*.

JUDGE.

Certificate of. See *County Court*, IV.

Order of. See *Award. County Court*, V. *Writ of Summons*.

JUDGMENT.

Postponing delivery of. See *County Court*, XI.

JUDICIAL.

Notice. See *Marriage Fee*.

JUSTICE.

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JUSTICE.

Of the peace. See *Court. Colony*, I. *Lunatic*, II. *Penalties. Scales*.

JURISDICTION.

Of County Court. See *County Court*, IX., X. *Merchant Shipping Act*, II.

Of county justices. See *Lunatic*, II. *Quarter Sessions*.

Of Judge. See *County Court*, V.

Of justice of the peace. See *Colony*, I.

LANDS CLAUSES CONSOLIDATION ACT.

See *Company, Railway*, IV.

LANDLORD.

And tenant. See *Mortgage*, I. *Notice to quit*.

LAW.

Of colony. See *Colony*, II.

LAY RECTOR.

See *Church*.

LEASE.

LESSEE. } See *Covenant*.

LESSOR. }

LIBEL.

1. An action for libel does not lie against an officer in the army for official reports made by him in the discharge and under the obligation of military duties touching the military competence and qualifications of an officer under his command, though alleged to have been made maliciously and without reasonable or probable cause. Per *Mellor, Lush and Hayes JJ.*, Cockburn C. J. dissentiente.

2. The only remedy for a wrong done by a commanding officer to an inferior

in the discharge of military duty is the redress provided by the articles of war. *Per Mellor, Lush and Hayes JJ., Cockburn C. J. dissentiente.*

3. Action for libel brought by the plaintiff, who was a lieutenant colonel in the army, holding a commission as captain in Her Majesty's regiment of Coldstream Guards. Plea. That the defendant was an officer in Her Majesty's army, holding the office of major general commanding the brigade of Foot Guards, of which the regiment of Coldstream Guards formed part, and was the superior military officer of the plaintiff, who was under his command; and that it was the defendant's duty, as such superior military officer, to forward to the adjutant general of Her Majesty's army at head quarters certain letters written and sent to the defendant as such superior officer in relation to their military conduct, duties, and qualifications by the officers under his command, and to make, in relation thereto, for the information of the commander in chief of the army, reports in writing to the adjutant general on the subjects of such letters. The plea then stated the receipt by the defendant from the plaintiff of certain letters in relation to the plaintiff's military duties, and to certain orders received by him as such officer, and to his conduct and competence and fitness for his duties as such officer, in which letters the plaintiff requested that they might, in performance of the defendant's duty as such superior officer, be forwarded by the defendant to the adjutant general for the information of the commander in chief; and that thereupon the defendant, in the ordinary course of his military duties as such superior officer, and because it was necessary and incumbent upon him by his duty to Her Majesty as such superior officer so to do, and as an act of military duty, and not otherwise or for any other reason, forwarded the letters to the adjutant general, and for the information of the commander in chief when forwarding those letters made certain reports in writing in relation to them and their contents, and to certain military orders therein referred to, and with respect to the plaintiff's conduct as such offi-

cer in relation to those orders, and to the plaintiff's incompetence in the field, and his unfitness to conduct the business of a battalion in barracks, in the form of letters addressed to the adjutant general, being the proper officer to receive those letters and reports, and the occasion being the proper one according to the discipline and regulations in force in Her Majesty's army for the defendant to make those reports in writing. Replication. That the words were written and published of actual malice on the defendant's part, and without any reasonable, probable, or justifiable cause, and not *bonâ fide* or in the *bonâ fide* discharge of his duty as superior officer. Demurrer.

(1.) Held, *per Cockburn C. J.*, that the replication meant that the defendant's representations as to the plaintiff, though made on an occasion of military duty, were made dishonestly, maliciously, and without a belief in their truth, and therefore was an answer to the plea.

(2.) *Per Mellor J.* Held, that the replication was no answer to the plea without an allegation that the statements contained in the letters written by the defendant were false to the defendant's knowledge. And *Quære*, whether the replication with that allegation would have been good?

(3.) *Per Lush J.* *Quære*, as to the meaning of the allegation in the replication that the letters were not written *bonâ fide* or in the *bonâ fide* discharge of the defendant's duty as superior officer? But Held, that, even if it was equivalent to an allegation that the defendant knew the statements in the letters to be false, the action was not maintainable. *Dawkins v. Lord Frederick Paulet*, 768.

See Slander.

Equitable. *See Bankrupt*, I.

For costs. *See Attorney*, III. *Bill of Exchange*, II.

LIMITATION.

LIMITATION.

Of time. See *Merchant Shipping Act*, I.

LICENCE.

See *Prescription. Salmon Fishery*, I., II.

To assign lease. See *Covenant*, II.

LOCAL ACT.

See *Public Health*.

LOCAL AUTHORITY.

See *Nuisance*, I.

LOCAL BOARD OF HEALTH.

See *Public Health. Quo Warranto*.

LOCAL GOVERNMENT ACT.

The Local Government Act, 1858, 21 & 22 Vict. c. 98. s. 14., enacts, "In cases where any place hereby authorized to adopt this Act includes within its limits any less place which, if it were not so included, would of itself be authorised to adopt this Act, such less place shall not be entitled to adopt this Act unless the greater place within the limits of which it is included has refused to adopt the same, or unless it has been determined by one of Her Majesty's principal Secretaries of State, in manner hereinafter mentioned, that such less place ought, as respects the adoption of this Act, to be excluded from the limits of such greater place." The parish of *L.*, containing 1400 acres, comprised the corporate borough of *L.*, containing 100 acres. By stat. 2 & 3 W. 4. c. 64. s. 35. Schedule (O) 14, the borough of *L.*, as to the election of members to serve in Parliament, included the parish of *L.* and part of another parish. The parish of *L.* adopted the Local Government Act, 1858, and, on appeal by some of the inhabitants of the borough under sect. 17 to the Secretary of State, he ordered that the Act should be in force in the parish.

1. Held that the parliamentary borough of *L.* was not a place authorized to adopt the Act within sect. 14 of

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stat. 21 & 22 Vict. c. 98., and that the parish of *L.*, though including the corporate borough of *L.*, was so authorized, and therefore the order of the Secretary of State was valid.

2. Per *Cockburn C. J.* Where a borough is not co-extensive with a parish, the portion of the parish without the borough is not a place having a known or defined boundary within stat. 21 & 22 Vict. c. 98. s. 13. *The Queen v. Hardy*, 926.

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Engine. See *Company, Railway*, III.

LONDON.

Bankers. See *Cheque*.

LONDON (CITY) COURT.

See *County Court*, XI.

LUNATIC.

I. Stat. 24 & 25 Vict. c. 55. s. 7. does not take away the right which overseers of parishes have under stat. 16 & 17 Vict. c. 97. s. 108. to appeal against an order adjudging the settlement of a pauper lunatic. *The Queen v. The Guardians of the Medway Union*, 439.

II. Stat. 3 & 4 Vict. c. 54. s. 1. enacts that if any person while imprisoned in any prison under sentence, &c. becomes insane, he shall be removed by warrant of the Secretary of State to an asylum, and remain there until he becomes of sound mind, whereupon if he remains subject to be continued in custody he shall be removed back to the prison, or, if the period of imprisonment has expired, he shall be discharged. Sect. 2. "In all such cases as aforesaid" two justices of the county, city, borough, or place where such person is imprisoned shall inquire into his settlement and make an order on the parish of his settlement to pay all the charges of inquiring into his insanity, and of conveying him to the asylum, and a weekly sum for his maintenance in the asylum. Stat. 11 & 12 Vict. c.

1036 CORPORATE PROPERTY.

1. The object of the statute is that enough is stated in the register of copy-right to identify the picture, &c., and whether the description of the subject-matter is sufficient for this purpose is a question of fact for the tribunal.

2. It is no defence under this Act that the copy was made or sold, &c., under a bonâ fide belief that the consent of the proprietor had been obtained, though it is ground for the infliction of a merely nominal penalty.

3. It is immaterial whether the copy of a painting, drawing, or photograph, as the case may be, is made by means of a painting, or of a drawing, or of a photograph.

4. If the design of a picture, &c., is made in violation of the statute, it is immaterial whether this is done directly from the original, or indirectly through the medium of a copy.

5. The sale of every copy made in violation of the Act is the subject of a distinct penalty, although there is only one sale. *Ex parte Beal, in re Beal v. Graves*, 395.

CORPORATE PROPERTY.

See *Rate, Poor*, II.

CORPORATION.

See *Municipal Corporation. Rate, Poor*, II.

COSTS.

Of action. See *Attorney*, III. *Bill of Exchange*, II. *County Court*, III., IV., VI., VII., VIII. *Formâ pauperis*.

Of appeal against Commissioners. See *Salmon Fishery*, II.

Of indictment. See *Highway*, I.

Of maintenance of pauper. See *Lunatic*, II.

COUNCILLOR.

Town. See *Municipal Corporation*, I., II.

COUNTY.

COUNTY.

Court. See *County Court*.

Gaol. See *Lunatic*, II.

Justices. See *Lunatic*, II. *Penalties*.

Treasurer. See *Penalties*.

COUNTY COURT.

I. By stat. 13 & 14 *Vict. c. 61. s. 14.* an appeal is given from the determination of the County Court, provided the party appealing shall, within ten days after the determination, give notice of appeal to the other party, and also give security, to be approved by the clerk of the Court for the costs of the appeal. By rule 134 of the Rules and Orders for regulating the Practice of the County Courts, &c., 1857, where a party proposes to give a bond by way of security he shall serve on the opposite party and the Registrar notice of the proposed sureties, and the Registrar shall forthwith give notice to both parties of the day and hour for the execution of the bond, and state in the notice to the obligee that he must then make objection to the sureties. Held that, where an appellant has done all he can do to give security within the ten days, and the delay in doing so is caused by the registrar or respondent, there is a sufficient compliance with sect. 14 and rule 134. *Waterton v. Baker, Field*, claimant, 23.

II. The County Courts Act, 1867, 30 & 31 *Vict. c. 142. s. 10.*, by which actions for malicious prosecution and other actions of tort may be stayed or remitted for trial to a County Court unless the plaintiff give security for costs or satisfy the Judge that he has a cause of action fit to be prosecuted in the superior Court, applies to an action commenced before the passing of the Act. *Kimbray v. Draper*, 80.

III. 1. The distance at which the

defendant resides from the plaintiff when the action is brought is not alone a ground for granting costs under The County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 5.

2. The plaintiff, who resided at *Edinburgh*, sued the defendant, who resided in *London*, for wine sold and delivered to him not to be dealt with in the way of his trade, and judgment was signed by default. The costs were less than if an action had been brought in the County Court. Application for costs refused. *Thompson v. Dallas*, 193.

IV. 1. *Quære*, whether sect. 5 of The County Courts Act, 1867, 30 & 31 Vict. c. 142., was intended to apply to actions which cannot be brought in a County Court?

2. If it was so intended the Court or a Judge has power under that section to allow the plaintiff in such actions his costs, though the sum recovered does not exceed 10*l.*, and the Judge declines to certify that there was sufficient reason for bringing the action in the superior Court. *Grey v. West*, 196.

V. The County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 10., enacts that in actions of tort brought in a superior Court "a Judge of the Court in which the action is brought" may make an order that unless the plaintiff give security for costs or satisfy the Judge that he has a cause of action fit to be prosecuted in the superior Court proceedings shall be stayed or the cause be remitted for trial before a County Court. A Judge of the Common Pleas made an order under that section that actions for an irregular execution under County Court process brought in this Court against the registrar of the County Court and the plaintiff in the original action should be remitted to be tried in the County Court. Held,

1. That the order might be made by a Judge of one of the other Courts sitting at Chambers under stats. 11 *G.* 4 & 1 *W.* 4. c. 70. s. 4. and 1 & 2 Vict. c. 45. s. 1.

2. That the order was subject to be reviewed by this Court.

3. That the action was properly remitted for trial before a County Court,

but the order was varied as to the County Court in which the trial should be. *Owens v. Woosman*. *Owens v. Jones*, 243.

VI. The plaintiff commenced an action of trespass before the 20th *August*, 1867, on which day The County Courts Act, 1867, 30 & 31 Vict. c. 142., received the Royal assent, and recovered at the Summer Assizes a verdict for less than 5*l.*; but title to land came in question. The Judge before whom the cause was tried did not certify on the record for costs under stat. 13 & 14 Vict. c. 61. s. 12., nor did the plaintiff obtain an order from a Judge for that purpose under stat. 15 & 16 Vict. c. 54. s. 4. before the 1st *January*, 1868. On that day stat. 30 & 31 Vict. c. 142. came into operation, by which stat. 13 & 14 Vict. c. 61. s. 12. and 15 & 16 Vict. c. 54. s. 4. were repealed. Held,

1. That the plaintiff having, under stat. 13 & 14 Vict. c. 61. ss. 11. 12., become entitled to judgment for the amount of the verdict and no costs unless he obtained an order under stat. 15 & 16 Vict. c. 54. s. 4., the repeal of these statutes did not enable him to sign judgment for costs under the Statute of *Gloucester*, 6 *Edw.* 1. c. 1.

2. That stat. 15 & 16 Vict. c. 54. s. 4. being repealed, the Court had no power to make an order for costs.

3. *Semble*, that stat. 13 & 14 Vict. c. 61. s. 11. was a repeal of the Statute of *Gloucester* as to those actions commenced after the passing of that Act to which it was applicable, and the repeal of stat. 13 & 14 Vict. c. 61. s. 11. by stat. 30 & 31 Vict. c. 142. s. 33. did not revive the Statute of *Gloucester* as to those actions; and therefore if the plaintiff had not been in a condition to sign judgment till after the repeal of stat. 13 & 14 Vict. c. 61. s. 11. he would not be entitled to judgment for his costs.

4. *Restall v. The London and South Western Railway Company*, 37 *L. J. Exch.* 89; *L. R.* 3 *Exch.* 141, departed from: *Morgan v. Thorne*, 7 *M. & W.* 400, followed. *Butcher v. Henderson*, 403.

VII. 1. The Statute of *Gloucester*, 6 *Edw.* 1. c. 1., is revived by the repeal in

stat. 30 & 31 Vict. c. 142. of the restrictive provisions as to costs in previous County Courts Acts.

2. An action of contract was commenced in this Court before the passing of stat. 30 & 31 Vict. c. 142., under circumstances in which by stat. 9 & 10 Vict. c. 95. s. 128. the Superior Courts had concurrent jurisdiction with the County Court. It was tried after the Act came into operation, and a verdict given for the plaintiff for less than 20*l.*: held that he was entitled to his costs under the Statute of *Gloucester*, 6 Edw. 1. c. 1.

3. *Mount v. Taylor*, 37 L. J. C. P. 325; L. R. 3 C. P. 645, upheld by this Court. *Levy v. Sanderson*, 410.

VIII. 1. Per *Lush* and *Hayes JJ.* In cases where there is neither exclusive nor concurrent jurisdiction in the superior Courts, nor any ground for obtaining a Judge's certificate for costs, the Statute of *Gloucester*, 6 Edw. 1. c. 1., is repealed by the provisions in the County Courts Act, 9 & 10 Vict. c. 95. s. 129., 13 & 14 Vict. c. 61. ss. 11. 12., 15 & 16 Vict. c. 54. s. 4., which prevented the plaintiff from obtaining his costs in any way; and is not revived as to such cases by The County Courts Act, 1867, 30 & 31 Vict. c. 142., which repealed those provisions as to costs.

2. Per *Hannen J.*, and *semble* per *Cockburn C. J.* The effect of repealing the enactments in the County Courts Acts, which empowered the Court or a Judge to order that the plaintiff should recover his costs, and which imposed a condition on the obtaining them, was to leave the plaintiff in the position in which he was before the existence of the repealed enactments, that is, entitled to recover his costs under the Statute of *Gloucester*.

3. An action for goods sold was commenced before the passing of The County Courts Act, 1867, 30 & 31 Vict. c. 142., and was by order of a Judge tried in the County Court after that Act came into operation, and a verdict obtained for 15*l.* 2*s.*: there was neither exclusive nor concurrent jurisdiction in the superior Courts, nor any ground for obtaining a Judge's certi-

ficate for costs. Held, per *Lush* and *Hayes JJ.*, that the plaintiff was not entitled to costs; per *Hannen J.*, and *semble* per *Cockburn C. J.* that he was. *Mirfin v. Attwood*, 414.

IX. By the County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 11., "all actions of ejectment, where neither the value of the lands, &c., nor the rent payable in respect thereof," exceeds 20*l.* by the year, may be brought in the County Court. Held,

1. That the test of the jurisdiction of the County Court is the value or rent as between the litigant parties, and not the value or rent as between the lessee and a sublessee.

2. That where a County Court Judge had decided that the annual value did not exceed 20*l.*, and there was evidence to support his decision, this Court could not grant a prohibition; per *Cockburn C. J.* and *Lush J.*, *Hannen J.* *hæsitante*. *In re Brown v. Cocking*, 503.

X. By the County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 11., "All actions of ejectment where neither the value of the lands, &c., nor the rent payable in respect thereof, shall exceed the sum of 20*l.* by the year," may be brought in the County Court. In ejectment against the occupier by the assignee of a term subject to a ground rent, the County Court Judge was of opinion that by deducting the ground rent the annual value of the premises was reduced below 20*l.*, and therefore he had jurisdiction. Held,

1. That the value intended in sect. 11 is the marketable value of which the rent paid by the tenant to the immediate landlord is, in the absence of exceptional circumstances, a fair criterion.

2. That, the County Court Judge having adopted an erroneous test of value, this Court would grant prohibition. *In re Elstone v. Rose*, 509.

XI. The County Courts Act, 1867, 30 & 31 Vict. c. 142. s. 13., allows, with the leave of the Judge, an appeal from the decision of a County Court in actions in which an appeal was not before allowed. By sect. 25 the words

"County Court" include the Courts held by virtue of the *London (City) Small Debts Extension Act, 1852, 15 & 16 Vict. c. lxxvii.* By sect. 8 of the latter Act, in case of illness or absence, the Judge may appoint a deputy. An action in which there could not have been an appeal before stat. 30 & 31 *Vict. c. 142.* was tried in the Sheriffs' Court by a deputy of the Judge in his absence, who took time to consider: the Judge on his return in *August, 1867*, read the decision of his deputy, but, in order to give the defendants power of appealing, postponed the formal delivery of judgment until the 1st *January* following, when he delivered judgment and gave leave to appeal, and, the parties not agreeing, a case was stated by the deputy and signed by the Judge. Held,

1. That the judgment of the deputy was the judgment of the Court, and the postponement of its formal delivery made it a judgment of the 1st *January, 1867.*

2. That stat. 30 & 31 *Vict. c. 142. s. 13.* affected procedure, and not the rights of the parties, and therefore was retrospective, and gave an appeal in this action. *Rathbone and others, appellants, Munn, respondent, 708.*

Jurisdiction of. See *Merchant Shipping Act, II.*

Rules and orders for regulating the practice of. See *supra, I. Merchant Shipping Act, II.*

COURT.

By stat. 20 & 21 *Vict. c. 43. s. 2.,* a party appealing from the determination of justices shall, within three days after receiving the case, transmit it to the superior Court. A case was received by the appellant on *Good Friday*, who transmitted it to the Court on the following *Wednesday.* Held that, the offices of the Court being closed until *Wednesday,* the case was duly transmitted. *In re Mayor, appellant, Harding, respondent, 27, note (a).*

Of oyer and terminer. See *Colony, I.*

Of Quarter Sessions. See *Quarter Sessions.*

COVENANT.

I. The first count of the declaration was upon a covenant in a lease that the lessees and their assigns would maintain and keep in repair the forge and buildings demised and all buildings which should be erected during the demise, and all additions and improvements thereto, and would maintain and keep in good working order the fixtures, steam engines, &c., tools, utensils, and other articles demised, and also which might during the demise be brought or set up on the premises, and would replace and make good all such fixtures, engines, &c., tools, utensils, and other articles as should be broken or worn out. The second count was upon a covenant that neither the lessees nor their assigns would assign or part with the possession of the demised premises without the consent in writing of the lessor.

As to the first count.

Held. 1. That so much of the covenant as related to buildings and to machinery, tools and utensils, which were tenant's fixtures, ran with the land. But,

2. That so much of it as related to tools and utensils, which were not fixtures, did not run with the land.

3. That the assignee was not liable on this count for breaches of the covenant after an assignment by him without the consent of the lessor.

As to the second count.

Held. 4. That the covenant ran with the land and bound an assignee to whom the premises had been assigned with the consent of the lessor.

5. That the lessor could recover damages indirectly in respect of those breaches of covenant which had already occurred, and future breaches; the measure of the damages being such a sum as would, so far as money could, put the plaintiff in the same position as if he had retained the liability of the defendant instead of having an inferior remedy against a person less able to perform the covenants or compensate for breaches of them. *Williams v. Earle, 740.*

II. A lease of premises for fourteen B. & s.

1050 MUSICAL COMPOSITION.

III. At an election of councillors under stat. 5 & 6 *W.* 4. c. 76. s. 32. voting papers designated the person voted for by the initial of his Christian name. Held misnomers, and therefore cured by sect. 142. *The Queen v. Plenty*, 386.

IV. 1. If an elector at a municipal corporation election having knowledge or notice of the disqualification of a candidate wilfully votes for him, his vote is thrown away. But

2. Knowledge of the fact which creates a legal disqualification does not involve knowledge that the candidate is legally disqualified.

3. At the annual election of councillors in a borough not divided into wards, there were four vacancies and five candidates, including *B.* and *M.* *B.* was mayor of the borough, and as such was returning officer and presided at the election. Before the opening of the poll on the morning of the election a formal notice was served upon the deputy mayor and assessors, and within half an hour after on *B.* himself, that he was disqualified for the office of councillor during the term of his mayoralty; and about half an hour after the opening of the poll notices to the same effect addressed to the burgesses were posted up in conspicuous parts of the borough. *B.* had 312, *M.* 143 votes. Held, that the votes given for *B.*, though bad, were not thrown away, and that there must be a new election. *The Queen v. the Mayor, & c., of Tewkesbury*, 683.

See *Penalties. Public Health. Rate, Poor*, II.

MUSICAL.

Composition. See *Copyright*.

NECESSARIES.

See *Baron and Feme*, II.

NEGLIGENCE.

See *Company, Railway*, II. *Nuisance*, II.

NOTICE.

NOTICE.

See *Quarter Sessions*.

To certifying surgeon. See *Factory Act*.

To electors. See *Municipal Corporation*, IV.

To quit.

1. A notice to quit must be such as the tenant may act upon with safety, that is, one which is in fact, and which the tenant has reason to believe to be, binding on the landlord.

2. A notice to quit given by a general agent in his own name is valid; qualifying the dictum in *Doe d. Lyster v. Goldwin*, 2 *Q. B.* 143. 146. Aliter, if given by an agent holding a special or limited authority.

3. In *October*, 1863, the trustees of *G.*'s marriage settlement purchased a farm, *G.* furnishing a portion of the purchase money. From the time of the purchase *G.* assumed the entire controul over the farm, and had for twenty-six years been allowed by the trustees to have the entire management of all the other settled estates. At the time of the purchase the defendant was yearly tenant of the farm to the vendor. *G.* negotiated with him as to the terms and continuance of the holding, and he treated with and considered *G.* as the legal owner. The Court, having power to draw inferences of fact, held that *G.* had authority from the trustees to give the defendant notice to quit, and that a notice given in his own name, not purporting to be given as agent of the trustees, was valid. *Jones v. Phipps*, 761.

NUISANCE.

I. By The Nuisances Removal Act for *England*, 1855, 18 & 19 *Vict.* c. 121. s. 8., the word "nuisances" includes any ditch or drain so foul as to be a nuisance or injurious to health; and any accumulation or deposit which is a nuisance or injurious to health. By sect. 12, where a nuisance is ascertained by the local authority to exist, they shall cause complaint thereof to be made before a justice of the peace; and such

justice shall issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or, if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices, and if it be proved to their satisfaction that the nuisance exists, they shall make an order on such person, owner or occupier, for the abatement or discontinuance and prohibition of the nuisance. By sect. 22 the local authority are required to lay down a sewer along or instead of a ditch used for the conveyance of sewage when it cannot in their opinion be otherwise rendered innocuous.

1. An order may be made under sect. 12 upon a person who causes a nuisance, though it arises at a distance from his premises.

2. Where several persons drain into one place, an order under sect. 12 may be made upon one whose drainage by itself causes a nuisance.

3. But if, though the aggregate drainage is a nuisance, the drainage of each is not by itself enough to cause a nuisance; *Quære*, whether an order should be made under sect. 12, or a sewer be laid down under sect. 22? And, per *Blackburn J.*, it is for the local authority to determine which.

4. An order under sect. 12 may be made upon a person who claims an easement to drain through land of *A.* into a watercourse on land of *B.*

5. *F.*, the owner of six houses let to yearly tenants, made a drain from them by leave of the owner of adjoining land through his land into a watercourse on *W.*'s land, where the drainage became a nuisance. Held, that an order under sect. 12 was rightly made on *F.* *Brown*, appt., *Bussell*, respt.; *Francomb*, appt., *Freeman*, respt., 1.

II. An incorporated water Company created a nuisance in a public highway by leaving unfenced a stream of water which they had caused to spout up in it. The horses of the plaintiff were frightened, and swerving from it fell into an unfenced excavation in the highway made by contractors who were constructing a sewer, and were thereby

injured. Held, that the water Company and not the contractors were the parties liable. *Hill v. The New River Company*, 303.

OFFICER.

In the army. See *Libel*.

OBSTRUCTION.

See *Highway*, II.

ON DEMAND.

See *Promissory Note*.

ORDER.

For payment of money. See *Bill of Exchange*, I.

In lieu of personal service. See *Writ of Summons*.

Of judge. See *Award*. *County Court*, V. *Formd Pauperis*.

Of justice. See *Nuisance*.

Of removal.

By stat. 35 G. 3. c. 101. s. 2., when any poor person brought before justices for the purpose of being removed by an order of removal is unable to travel by reason of sickness or other infirmity, or it would be dangerous for him so to do, they are to suspend the execution of the order until it can be safely executed without danger to any person who is the subject thereof; and the charges incurred by the suspension may be directed to be paid by the parish to which the poor person is ordered to be removed, in case removal shall take place, or in case of the death of such poor person before the execution of the order. By stat. 49 G. 3. c. 124. s. 3., where an order of removal is suspended on account of the dangerous sickness or other infirmity of any person or persons thereby directed to be removed, the execution of the order shall also be suspended for the same period with respect to every other person named therein being of the same household or family. On the 19th November, 1860, an order was made for the removal of

G., and E. his wife, from I. to S., and suspended on account of the sickness of G. He continued sick until his death, and by reason thereof could not be removed: he died on the 13th June, 1861. Shortly before his death E. became unable to travel by reason of sickness, and continued so until her death. On the 25th March, 1866, E. became irremovable under stat. 28 & 29 Vict. c. 79. s. 8., in consequence of her residence for one year without relief in I. before the 9th November, 1860. She died on the 10th April, 1867. Held,

1. That the suspension of the order of removal continued to operate during the illness of the wife.

2. That on her death an order for the payment of the expenses of the maintenance of the paupers from the 13th June, 1862, till the 25th March, 1866, might be made under stat. 35 G. 3. c. 101. s. 2.

3. That such order was made within six months from the time when the expenses became payable, and therefore within the time limited by stat. 11 & 12 Vict. c. 43. s. 11.

4. Concessum. That the charges incurred in the relief of E. (1) during the year of her irremovability next after the death of the husband, under stat. 9 & 10 Vict. c. 66. s. 2., and (2) after she became irremovable under stat. 28 & 29 Vict. c. 79. s. 8., were not recoverable. *The Queen v. The Overseers of Sculcoates*, 911.

PARISH.

See *Local Government Act. Rate, Poor*, IV.

PARLIAMENTARY.

Borough. See *Penalties*.

PAROCHIAL.

Relief, receipt of. See *Municipal Corporation*, I.

PARTNER.

See *Bankrupt*, III.

PASSENGER.

See *Company, Railway*, I., II.

PAUPER.

PAUPER.

Lunatic. See *Lunatic*, I.

Maintenance of. See *Order of Removal*.

PAVING.

New street. See *Metropolis Management Act*.

PAYMENT.

Immemorial. See *Marriage Fee*.

Of doubtful claim. See *Bankrupt*, I.

PENALTIES.

A parliamentary borough was by charter constituted a municipal borough, with the powers and privileges belonging to those named in Schedule (B.) to stat. 5 & 6 W. 4. c. 76. It had no grant of a separate Court of Quarter Sessions; and the justices of the county, by virtue of sect. 111, exercised the jurisdiction of justices of the peace in and for the borough concurrently with the mayor, who by sect. 57 is ex officio a justice of the peace for the borough, and so continues during the year next succeeding his year of office. Held:

1. That the mayor, while acting as a justice in and for the borough, was acting as a justice for the county, and therefore penalties imposed by him were to be paid to the treasurer of the county and not to the treasurer of the borough.

2. That stat. 11 & 12 Vict. c. 43. s. 31., which directs the clerk of the justices, in cases where the statute on which the information or complaint is framed contains no directions for the payment of the penalties or other sums of money, to pay them "to the treasurer of the county, riding, division, liberty, city, borough, or place" for which such justice shall have acted, means a liberty, city, borough or place which has a Court of Quarter Sessions. *The Mayor, &c., of Reigate v. Hart*, 129.

PENALTY.

PENALTY.

See *Copyright*, II.

PERJURY.

See *Award*.

PERPETUAL CURATE.

See *Church*.

PERSONAL.

Representative. See *Right of Action*.

PERSONATION.

Stat. 14 & 15 *Vict. c. 105. s. 3.* makes it an offence to "personate any person entitled to vote" at an election of guardians. *A.* delivered to the person appointed to collect the voting papers the voting paper of a person who was dead. Held not an offence within sect. 3. *Whiteley*, appt., *Chappell*, resp., 1019.

PIANOFORTE SCORE.

Of opera. See *Copyright*, I.

PLEADING.

See *Bankrupt*, III., V., VI. *Companies Act*. *Infancy*. *Libel*. *Right of Action*. *Slander*. *Com-*

POOR.

See *Lunatic*, I. *Rate*, *Poor*. *Personation*.

POWER.

Of distress. See *Mortgage*, I.

PRACTICE.

Of Court. See *Attorney*, II. *Court*.

On appeal. See *Rate*, *General District*, II.

PRESCRIPTION.

The plaintiff claimed under the lord of the manor of *C.* as lessee of the street tolls and markets of the town of *C.* The manor was granted by *Hen. 3* to

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the inhabitants of *C.*, with a market and fair there, for a term of four years from 1220. *Car. 1*, by letters patent, granted it in fee to *H.*, and all tolls and markets within it. From time immemorial till 1786 there was a market house belonging to the lord of the manor in the High Street of *C.*, and tolls immemorially paid, "as well of the market as for articles hawked about the town, and for stalls and standings for the sale of articles erected in the streets." This right was recognised and confirmed by several local Acts: 26 *G. 3. c. 116. s. 43.*, 46 *G. 3. c. 117. s. 125.*, 1 & 2 *G. 4. c. cxxi. s. 140.*, and 15 & 16 *Vict. c. 1. s. 133.* In 1807 the *C. Commissioners* appointed under stat. 46 *G. 3. c. 116.* became lessees of the tolls, which were taken of a certain amount from 1806 to the time of the present action. Upon one of the boards exhibited in 1841 it appeared that a toll was taken payable by all persons hawking about the town fish, fruit, vegetables, or any other article for which no toll had been before paid in the market, of, inter alia, 1s. for every cartload; and for many years previous to the year 1841, and as long as living witnesses could remember, and continuously down to the time of the action, a similar board with similar words and figures had always been fixed in a conspicuous part of the market house at *C.* for the time being. The Court having power to draw inferences of fact: Held, that the claim of toll was good, because

1. It ought to be inferred that the toll had existed from time immemorial.

2. If not, still a lawful origin of the toll within the time of legal memory, by means of a contemporaneous dedication of the streets to the public and a reservation of the toll by the Crown, ought to be inferred.

3. A toll reasonable in amount, but varying from time to time according to the value of money, is valid in law.

4. Although a toll traverse, i. e., a toll for the mere use of a public way, is bad, this toll was not merely for passing and repassing, as it imported a licence to rest and stay upon the land for the purpose of selling merchantable commodities. *Lawrence v. Hitch*, in error, 467.

PRESENTMENT.

Of bill of exchange. See *Bill of Exchange*, I.

Of prison. See *Quarter Sessions*.

PRESUMPTION.

See *Marriage Fee*.

PRISON.

See *Lunatic*, II.

Alteration of. See *Quarter Sessions*.

PRIVILEGED.

Communication. See *Libel*.

PROHIBITION.

See *County Court*, IX., X.

PROMISSORY NOTE.

1. The addition to a promissory note of words which cannot prejudice any person does not destroy its validity.

2. The words "on demand" were added to a promissory note without the knowledge of the maker, after it had been delivered to the payee. Held, that the maker was not discharged from his obligation to pay it, as the words only added what the law would have supplied. *Aldous v. Cornwall*, 607.

PROVISIONAL.

Order. See *Public Health*.

PUBLIC BUILDINGS.

See *Rate, Poor*, I.

PUBLIC HEALTH.

A portion of the borough of *T.*, consisting of the township of *N. S.* and parts of the townships of *T.*, *P.* and *C.*, was under the management of Commissioners constituted under a Local Act. In 1849 the townships comprising the parliamentary borough of *T.* were incorporated, and the powers of the Commissioners transferred to the Corpora-

PUMPING STATION.

tion pursuant to the Municipal Corporations Act, 5 & 6 W. 4. c. 76. s. 75. In 1851 the General Board of Health made a provisional order under The Public Health Act, 1848, 11 & 12 Vict. c. 63., which repealed the rating clauses of the Local Act, enlarged the area of that Act, and extended its unrepealed provisions over the whole of the municipal borough of *T.* Also it applied sect. 88 of The Public Health Act, 1848, except so much of it as provided that a railway and certain other property should be rated on one fourth only of its annual value, the effect of which was to subject those parts of the line of railway which were not in the township of *N. S.* to a rating at full value. The order was confirmed by stat 14 & 15 Vict. c. 103. "so far as" it was authorised by The Public Health Act, 1848. Held,

1. That it was within the power of the Board to repeal the rating clauses of the Local Act, enlarge its area, and extend its unrepealed provisions over the whole of the borough. But,

2. That the order was not authorised by sect. 10 of The Public Health Act, 1848, as it altered the provisions of that Act with respect to rating different descriptions of property. *North Eastern Railway Company*, appts., *The Mayor, &c., of Tynemouth*, respts., 616.

PUMPING STATION.

See *Rate, Poor*, VI.

QUARTER SESSIONS.

The Prison Act, 1865, 28 & 29 Vict. c. 126. s. 24., enacts, that the consideration of a presentment of the necessity for an alteration or enlargement of a prison "shall not be entertained by the prison authority unless not less than three weeks previous notice has been given in some one or more public newspaper or newspapers circulating within the district of the prison authority of their intention to take the same into consideration at a time and place to be mentioned in such notice." By sect. 5, as respects a prison belonging to a county, the justices in Quarter Sessions are the prison authority. At an ad-

journd *Epiphany* Sessions for the county due notice was given that presentments of visiting justices as to the necessity of alterations in the two county gaols would be taken into consideration at the *Easter* Sessions. At those Sessions it was resolved to refer the question to the consideration of a committee, who were to report to the next *Michaelmas* Sessions. The committee made their report to those Sessions, who made an order accordingly. Held,

1. That the order was valid, because the Quarter Sessions had power to adjourn the matter from the *Easter* Sessions to the *Michaelmas* Sessions.

2. The resolution at the *Easter* Sessions being equivalent to an adjournment, a formal entry of it was not necessary.

3. A fresh notice that the presentments would be taken into consideration at the *Michaelmas* Sessions was unnecessary. *The Queen v. The Justices of Westmorland*, 288.

See *Penalties*.

QUEEN'S PRISON.

See *Bail*.

QUO WARRANTO.

See *Municipal Corporation*, I., II.

A quo warranto information will not be granted at the instance of an individual against persons acting as a Local Board of Health constituted under The Public Health Act, 1848, 11 & 12 Vict. c. 63., and The Local Government Act, 1858, 21 & 22 Vict. c. 98. *The Queen v. Staples*, 928, note (a).

RATE.

General district.

1. The *Oxford University* Boat Club were possessed of a landing stage and a floating barge or house boat moored in the river *Isis* at a distance of thirty feet from the bank, by means of two iron rings, which were fixed to the barge, and passed loosely and moveably

round two posts driven into the bed of the river. Between the barge and the bank four other posts were driven into the bed of the river, and a moveable frame of boards laid on the top of these posts, but not fixed to them, nor touching the barge or bank, formed the gangway from the barge to the bank. The barge was roofed over and formed a room, which was used by the members of the club as a means of access to their boats, and for reading and other amusements. No land was occupied with the barge, nor was the club owner of the posts. The posts had been driven into the bed of the river more than twenty years for the purpose of being used as aforesaid, and had remained and been so used without the leave or licence of the Corporation of the city of *Oxford*, who were owners of the soil of the bed of the river, and no rent had been paid or other acknowledgment made by the club. Held, that the club was not rateable in respect of the barge, which was a mere chattel, nor in respect of the posts, as they had no exclusive occupation of them. *Grant*, appt., *The Oxford Local Board*, respts., 900.

II. 1. The general district rate made by a Local Board of Health constituted under The Public Health Act, 1848, 11 & 12 Vict. c. 63., and The Local Government Act, 1858, 21 & 22 Vict. c. 98., is not a rate "which by law is required to be based upon the poor rate" within The Union Assessment Committee Act, 1862, 25 & 26 Vict. c. 103. s. 28., and therefore, if the assessment for the relief of the poor is not in the judgment of the Local Board a fair criterion for the general district rate, they may make a new valuation in pursuance of sect. 56 of stat. 21 & 22 Vict. c. 98.

2. The parish of *S.* is coextensive with the borough and district and comprises within it the townships of *S.* and *F.*, each separately maintaining its own poor. In 1867 the Local Board made two district rates, and, the poor rate being in their judgment not a proper criterion, ordered a new valuation. At that time there was in force in the townships of *S.* and *F.* respectively a valuation list for assessing the poor rate

under The Union Assessment Committee Act, 1862, 25 & 26 Vict. c. 103. Held, that the Local Board were not bound to adopt the poor law assessment.

3. On the argument of a special case stated under stat. 12 & 13 Vict. c. 45. or stat. 20 & 21 Vict. c. 43., the appellant begins; reversing the practice recognised in *The Overseers of Hilton and Walkerfield*, appts., *The Overseers of Bowes*, respts., 7 B. & S. 223. *The North Eastern Railway Company*, appts., *The Local Board for Scarborough*, respts. *Same*, appts., *Same*, respts., 1009.

Poor.

I. Stat. 9 & 10 Vict. c. 39., which recited that Commissioners for improving the Metropolis had recommended the construction of a bridge over the Thames, near Chelsea, and that the Commissioners of Woods and Forests had caused plans of the intended bridge to be made, which had been approved by the Commissioners for the Treasury, constituted the Commissioners of Woods and Forests a corporation for the purpose of constructing the bridge, and empowered them to obtain a loan from the Commissioners for issuing Exchequer Bills for Public Works, the repayment to be secured by an assignment of the tolls which the Commissioners of Woods and Forests were authorised to take. The tolls were to be applied in payment of all expenses of the management and collection of the tolls, in maintaining the bridge, and in repayment of all advances and expenses made or paid for out of the Consolidated Fund. The bridge was constructed and vested in the Commissioners of Woods and Forests, and by stat. 14 & 15 Vict. c. 42. in the Commissioners of Works and Public Buildings, to whom their duties and powers were transferred; and the tolls taken exceeded the cost of maintaining the bridge. By stat. 21 & 22 Vict. c. 66. s. 2., when the sum borrowed from the Consolidated Fund should be paid off, no toll was to be taken for foot passengers. Held, by the Queen's Bench and affirmed by the Exchequer Chamber, that the occupa-

tion of the bridge was in the Commissioners of Works and Public Buildings as servants of the Crown, or at least in consimili casu, and therefore they were not rateable to the poor rate. *The Queen v. McCann*, 33.

II. Stat. 4 & 5 Vict. c. 48. s. 1. enacted that the municipal corporations named in the Schedules (A.) and (B.) of stat. 5 & 6 W. 4. c. 76. should in some cases be rateable to the poor rate in respect of lands, tenements and hereditaments being their property and in their occupation: provided that where such property is in a parish wholly within a borough named in those Schedules, and the poor of which are relieved by one entire rate, the exemption shall continue as if the Act had not passed. Held,

1. That the exemption continued, though the law which induced the passing of the Act was altered by the decision of the House of Lords in *The Mersey Docks Cases*, 11 H. L. C. 443.

2. A corporation created since stat. 5 & 6 W. 4. c. 76. is by stat. 16 & 17 Vict. c. 79. s. 2. entitled to the exemption in stat. 4 & 5 Vict. c. 48. s. 1.

3. The Union Chargeability Act, 1865, 28 & 29 Vict. c. 79., does not affect the exemption. *The Queen v. The Mayor, &c., of Oldham*, 262.

III. A lead mining Company, requiring the water of a watercourse which turned a corn mill, diverted a portion of it from its natural course by an artificial watercourse about a mile and a half in length, wholly within the parish of D., partly open and partly tunnelled, and for about 350 yards near the mine the water was conveyed in iron pipes: the whole, with the walls, sluices, flood gates, pipes and other works connected therewith, were repaired and maintained by the Company. They paid yearly 100*l.* to the owner of the mill for the diversion of the water; 7*l.* 7*s.* to the adjoining occupiers for the occupation of the land by the watercourse. The water was used principally for working the machinery of the mine, and for crushing, washing, and cleansing the ore. Held,

1. That the Company were liable to

be rated to the poor rate in respect of the occupation of the land by the watercourse.

2. That the watercourse was not exempt by reason of its being accessory to the working of a *lead* mine.

3. That the value of the land enhanced by its capability of conveying water to the mine might be taken as the rateable value of the watercourse. *The Talargoch Mining Company*, appellants, *The Guardians of the St. Asaph Union*, respondents, 210.

IV. Appeal against a poor rate for the parish of *H.* in respect of lands in the township of *T.*, on the ground that *T.* was part of the parish of *K.* A case was stated with power to the Court to draw inferences of fact. *H.* and *K.* are ancient immemorial parishes. *H.* consists, independently of *T.*, of the townships of *A.* and *H.*, the former maintaining its own poor and highways separately and having its own overseers and surveyors. The churchwardens and overseers of *H.* make poor rates for the remainder of the parish, which are called rates for the township of *H.*, but have for a considerable time included the lands of *T.* The district of *T.*, which is adjacent to *H.* and *K.*, has commonly been called a township or hamlet, but has not maintained its own poor or highways separately, nor appointed a constable for 100 years, and for anything that appeared to the contrary before that time the lands in *T.* had been rated to the poor and highway rates for *H.*, exclusive of *A.*, and the overseers and surveyors of highways for *H.* had acted for *T.* as if it were part of their district. On the other hand, the lands in *T.* from the earliest period were tithable to *K.* as being situate in that parish, and the occupiers were always rated to and paid church rates and the *Easter* and all other ecclesiastical dues to *K.* As to all ecclesiastical matters *T.* had been uniformly and immemorably treated and reputed as part of the parish of *K.* *H.*, *A.* and *K.* are mentioned in *Domesday Book*; *T.* is not. Stat. 32 G. 3. c. 109., for inclosing open fields and commons "within the townships of *H.*, *A.* and *T.*," which lay intermixed and dispersed, reciting, among

other things, that the lord of "the manor of *H.* and *T.*" was seised of the soil of the commons "within the said manor," empowered the Commissioners for putting the Act into execution to determine the boundaries of those townships and of the parishes adjoining. By their award all the rated lands in *T.* were dealt with and declared to be in the township of *T.* and parish of *K.* Held, notwithstanding the Inclosure Act and award, that *T.*, not being a township of itself, its association with *H.* for civil purposes, though for ecclesiastical purposes it was part of *K.*, might have a legal origin; and therefore the usage ought not to be disturbed. *The Queen v. Watson*, 306.

V. In pursuance of an Act of Parliament *The S. U. Railways and Canal Company* granted a lease in perpetuity of their undertaking to *The L. & N. W. Railway Company*, under the provisions of which a canal, part of their undertaking, was worked and managed by a joint committee in the name of *The S. U. Railways and Canal Company*, and was worked by *The L. & N. W. Railway Company*, and *The L. & N. W. Railway Company* made up to the shareholders of *The S. U. Railways and Canal Company* the deficiency in the earnings of their undertaking, in accordance with the guarantee in the lease of the payment of certain rents or sums of money in the nature of rent. Held, that the annual rent or sum of money received by *The S. U. Railways and Canal Company* from *The L. & N. W. Railway Company* under the lease was not to be taken into account in determining the rateable value of the canal. *The Queen v. The Overseers of the Parish of Lapley and the Assessment Committee of the Union of Penkridge*, 568.

VI. The Metropolitan Board of Works, in pursuance of the Acts for the local management of the metropolis, constructed a system of sewers to intercept the drainage of the metropolis connected with pumping stations, by means of which the sewage is lifted up from a lower to a higher level, and ultimately discharged many miles down the *Thames*, without the limits of the metropolis.

The sewers, except at the pumping stations, pass under the public highways of the metropolis or under land in which the Board have no property. The pumping stations were erected upon land the property of the Board, but are used solely as part of the main drainage and intercepting scheme. By one of the Acts power was given to them to raise money to be applied only in payment of the expenses of the works; and they were directed for the purposes of the Act to levy a rate of 3*d.* in the pound on the annual value of the whole of the property in the metropolis. All moneys raised by the rates were to be applied in payment of the sum borrowed, and the interest thereon, and towards defraying the expenses of the Board. They derive no pecuniary profit or advantage from the drainage and intercepting works, but the whole are maintained out of the funds raised in pursuance of the Acts. The Acts do not exempt them from rateability, or prohibit the application of money in their hands to the payment of parochial rates. The Board were rated to rates for the relief of the poor and for general purposes in the parish of G. in respect of (1) certain lengths of sewers, (2) a wharf and engine house, and (3) a pumping station, with wharf, lay-by for barges, tramways, two engine houses, four steam engines, boiler house, chimney stack, two filth hoists, coal sheds and dwelling house: the whole forming part and used solely for the purposes of the main drainage and intercepting scheme. Held,

1. That the sewers were not rateable, as they were not the subject of a beneficial occupation.

2. That the other property was not exempt by reason of its being part of the drainage scheme, nor the pumping station by reason of its being an adjunct to the sewers. *The Queen v. The Metropolitan Board of Works (Greenwich case)*, 937.

RAILWAY.

See *Company, Railway. Public Health. Rate, Poor*, V.

RATEABLE VALUE.

See *Rate, Poor*, III., V.

RATIFICATION.

RATIFICATION.

See *Award. Infancy*.

REAL PROPERTY.

See *Vendor and Purchaser*.

REASONABLE.

Diligence. See *Contract*, II.

Precautions. See *Company, Railway*, III.

Time. See *Contract*, II.

RECOGNISANCE.

See *Bail*.

REGULÆ GENERALES.

H. T., 7 & 8 G. 4. See *Municipal Corporation*, II.

Hilary Term, 1868, 120.

Trinity Vacation, 1868, 880.

Michaelmas Term, 1868. See *Vol.* 10.

RECTOR.

See *Perpetual Curate*.

REGISTRATION.

Of bill of sale. See *Mortgage*, I.

RELEASE.

See *Bankrupt*, VI.

REMOVAL.

Order of. See *Order*.

REPEAL.

Of Act, effect of. See *County Court*, VI., VII., VIII.

RESIDENCE.

See *County Court*, III.

RETROSPECTIVE.

Enactment. See *County Court*, II., XI.

RIGHT.

Of action.

1. Stat. 9 & 10 Vict. c. 93. gives to the personal representative of the person killed by the wrongful act, neglect, or default of another, not an independent cause of action, but a right of action, when there was a subsisting cause of action at the time of the death.

2. To a declaration on that statute, accord and satisfaction with the deceased in his lifetime is a good plea. *Read v. The Great Eastern Railway Company*, 714.

See *Colony*, II.

Of distress. See *Mortgage*, I.

ROAD.

Subsidence of. See *Metropolis Management Act*, II.

ROADWORTHINESS.

See *Company, Railway*, I.

RIVER.

Bed of. See *Rate, General District*, I.

SALE.

Bill of. See *Mortgage*, I.

Of goods. See *Contract*, I., III.

Of real property. See *Vendor and Purchaser*.

Of shares. See *Companies Act*.

SALMON FISHERY.

I. By The Salmon Fishery Act, 1865, 28 & 29 Vict. c. 121. s. 33., "licences shall be granted at fixed prices to all persons using any rod and line for fishing for salmon, and in respect of all fishing weirs, fishing mill dams, putts, putchers, nets or other instruments or devices, except rods and lines, whereby salmon are caught." Sect. 35 imposes

a penalty on fishing with rod and line without a licence. Sect. 36 subjects to a penalty "any person using any fishing weir, fishing mill dam, putt, putcher, net, or other instrument or device, not being a rod and line, for catching salmon," without a licence. Held, that the using a putt, though not with the intention of catching salmon, was within sect. 36; and though the putt had at its mouth an iron grating which prevented salmon from getting in, but which could be removed at any minute. *Lyne*, appt., *Leonard*, respt. *Same*, appt., *Fennell*, respt., 65.

II. Upon appeal against a decision of the Commissioners for *English Fisheries* under The Salmon Fishery Act, 1865, 28 & 29 Vict. c. 121. s. 45, which by subs. 9 incorporates the provisions of stat. 20 & 21 Vict. c. 43. as to the power of the superior Court to give costs, the respondent on the inquiry before the Commissioners contested the legality of a fishing mill dam, and argued the case on the appeal. Held that this Court, on quashing the order of the Commissioners, had power to order the respondent to pay the appellant his costs. *Garnett and others*, appellants, *Backhouse*, respondent. *Rolle*, appellant, *Whyte*, respondent, 306.

III. 1. Stat. 2 H. 6. c. 15. prohibits the placing of nets and engines across rivers so as to destroy the brood of fish and disturb the common passage of vessels, though they are not permanently fixed by day and night.

2. The Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109. s. 11., enacts, "No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters; . . . but this section shall not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant or charter or immemorial usage." For the purpose of catching fish with stop nets, a rope is extended across the stream from a stake driven into the shore near high water mark to an anchor in the bed of the river; each boat attached to this rope is furnished with a net about fifteen feet wide facing the tide,

with its mouth kept a few feet under the surface of the water: when a fish enters the net the fisherman jerks the mouth of the net upwards out of the water and takes the fish. The nets can only be used during certain states of the tide. Held, that stop nets were prohibited by stat. 2 H. 6. c. 15., and therefore unless they had existed from time immemorial were not excepted by stat. 24 & 25 Vict. c. 109. s. 11. *Holford v. George*, 815.

SALVAGE.

See *Merchant Shipping Act*, II.

SCALES.

A pair of scales had a hollow brass ball hanging upon the weight end of the beam; the ball was constructed with a neck which could be unscrewed so as to allow shot to be placed inside, and being hung by a hook upon the beam was easily removable. The scales were correct in that state; but if the shot inside the ball was removed the scales were unjust and against the purchaser. Upon an information under stat. 5 & 6 W. 4. c. 63. s. 28.: Held, that justices were justified in finding that the ball loaded with shot was no part of the scales, and that consequently they were unjust. *Carr*, appellant, *Stringer*, respondent, 238.

SEAMAN.

Enticing to desert. See *Merchant Shipping Act*, I.

SECURITY.

For costs. See *County Court*, I. II.

SEDUCTION.

1. An action for seduction is supported by evidence that the daughter who was under the age of twenty-one, being discharged from service, was returning home at the time of the seduc-

SETTLEMENT.

tion, and was on her return received into her father's house.

2. In estimating the damages the jury may take into account the expense of maintaining a bastard child, and the dishonour done to the plaintiff and his daughter. *Terry v. Hutchinson*, 487.

SETTLEMENT.

Of pauper. See *Lunatic*.

SEWER.

See *Nuisance*, I.

SEWERS.

See *Rate, Poor*, VI.

SHAREHOLDER.

See *Bankrupt*, II.

SHARES.

Calls on. See *Bankrupt*, II.

Contract for sale of. See *Companies Act*.

Forged transfer of. See *Company, Joint Stock*.

Transfer of. See *Companies Act*.

SHIPPING.

See *Merchant Shipping Act*.

SLANDER.

1. The repetition of a rumour injurious to another is actionable unless the occasion rendered it privileged.

2. It is no justification that the rumour existed.

3. Since The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. s. 61., a count in libel or slander setting out the words with an innuendo may be read as two counts, one with the innuendo and the other without it, and proof of either is sufficient.

4. Declaration in slander alleged that

SPECIAL CASE.

the defendant spoke of and concerning the plaintiff as chairman and director of *The S. E. Railway Company*, and of and concerning a fall in the market value of the shares in that Company, and of and concerning a rumour assumed by the defendant to have existed and been circulated, the words following, "You have heard what has caused the fall" (meaning thereby the fall in the market value of the shares in *The S. E. Railway Company*), "I mean the rumour about the S. E. Chairman having failed" (meaning thereby that the plaintiff being chairman and director of *The S. E. Railway Company* was insolvent). Plea, that in speaking the words the defendant meant and was understood by the bystanders to mean that there was a rumour current on the Stock Exchange about the chairman of *The S. E. Railway Company* having failed, and not that the plaintiff was insolvent as in the innuendo alleged: and that there was a rumour on the Stock Exchange about the chairman of *The S. E. Railway Company* having failed. Held on demurrer that the plea was bad. *Watkin v. Hall*, 279.

SPECIAL CASE.

See *Court. Rate, General District*, II.

STAMP.

See *Bill of Exchange*, I.

STATUTE OF FRAUDS.

See *Contract*, III.

STATUTORY.

Authority. See *Company, Railway*, III.

STOP NETS.

See *Salmon Fishery*, III.

STREET.

See *Prescription. Metropolis Management Act*.

SUBSIDENCE OF ROAD.

See *Metropolis Management Act*, II.

SURETY.

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SURETY.

Assent of. See *Bankrupt*, X.

TENANCY.

At will. }
By estoppel. } See *Mortgage*, I.

TENANT.

See *Covenant. Notice to quit*.

TENDER.

Of composition. See *Bankrupt*, VI.

TERM.

Of years. See *Mortgage*, II.

TIME.

For discharge of cargo. See *Contract*, II.

For entering appearance. See *Writ of Summons*.

For giving security on appeal. See *County Court*, I.

For laying information. See *Merchant Shipping Act*, I.

TITLE.

See *Vendor and Purchaser*, II.

TOLL.

See *Prescription*.

TOWN COUNCILLOR.

Election of. See *Municipal Corporation*.

TOWNSHIP.

See *Rate, Poor*, IV.

TRADING COMPANY.

See *Companies Act*.

TRANSFER.

Of shares. See *Companies Act*.

Of shares, forged. See *Company, Joint Stock*, I.

TREASURER.

Of county. }
Of borough. } See *Penalties*.

TRIAL.

See *Colony*, I.

TURNPIKE ROAD.

1. Under stat. 3 G. 4. c. 126. s. 113. the obligation to make, scour, cleanse and keep open the ditches, drains and watercourses for keeping turnpike roads dry and conveying the water from them is on the trustees, and not on the occupiers of adjoining lands.

2. The trustees of a turnpike road in making a new line of road under the powers of a local Act cut through the appellant's land, and thereby formed a high slope or bank on one side of the road. The foot of the slope or bank was stone fenced, and watercourses formed by the sides of the road by the trustees; the fence was repaired by them for four or five years, but not subsequently. The water flowing over the slope from the adjoining lands caused slips of the earth, whereby the watercourse was filled up, and a portion of the road obstructed. Held, that there was no obligation on the appellant under stat. 3 G. 4. c. 126. s. 113. to cleanse, scour and keep open the watercourse. *Merivale*, appellant, *The Trustees of the Exeter Turnpike Roads*, respondents, 70.

UNION.

Assessment Committee. See *Rate, General District*, II.

Chargeability. See *Rate, Poor*, II.

VALUATION LIST.

See *Rate, General District*, II.

VENTILATION.

Of mine. See *Coal Mine*.

VOTING PAPER.

See *Municipal Corporation*, II., III.

VENDOR AND PURCHASER.

I. 1. The rule laid down in *Flureau v. Thornhill*, 2 W. Bl. 1078,—that upon a contract for purchase of real property, if the title proves bad and the vendor is without fraud incapable of making a good one, the purchaser is not entitled to damages beyond the amount of the deposit and interest thereon and the expenses of investigating the title,—is anomalous, being founded on the state of the law as to real property; and does not apply where the nonperformance of the contract arises not from a difficulty as to title but from the fact of the party who engages to sell not having secured to himself the property in or the possession of the thing of which he takes on himself to dispose.

2. The defendants, mortgagees with a power of sale, sold to the plaintiff by auction the lease of a house, the particulars of sale stating that possession would be given on completion of the purchase. The transaction was by the conditions of sale to be completed by the 26th December. By the 5th condition, in case the vendor should be unable or unwilling to remove or comply with any objection or requisition as to the title, he was at liberty to rescind the contract and to return the deposit money without interest, costs or other compensation. The mortgagor being in possession refused to give it up; and the plaintiff, having sold to a purchaser who bought the house for occupation, required possession before completion. Thereupon the defendants rescinded the contract on account of the expense they would incur in order to enable them to complete. Held,

(1). That the defendants were not entitled to rescind under the 5th condition.

(2). That the plaintiff could recover

WARRANTY.

damages for the loss of profit on the resale, and the expense consequent on it.

- (3). That such damages were not too remote, according to the rule in *Hadley v. Baxendale*, 9 *Exch.* 341. *Engel v. Fitch*, 85.

II. Conditions of sale of a freehold house:—"5. The abstract of title will commence with a conveyance dated the 17th *April*, 1860, and no purchaser shall investigate or take any objection in respect of the title prior to the commencement of the abstract." 9. "If any error or mis-statement shall appear to have been made in the particulars of sale," it is not to annul the sale, but shall entitle the purchaser to compensation. The abstract commenced with the deed dated the 17th *April*, 1860, which conveyed the house in fee, subject to the covenants and conditions on the part of the grantee, his heirs and assigns, in a deed dated the 2nd *March*, 1850. The purchaser required that the vendor should shew that the covenants and conditions in the deed referred to did not affect the house. The vendor answered by referring to the 5th condition of sale. Held,

1. That the purchaser was entitled to have an unincumbered freehold title shewn on the abstract of the deed of the 17th *April*, 1860, notwithstanding the 5th condition.

2. That the objection was not within the 9th condition. *Phillips v. Caldecleugh*, 967.

See *Notice to quit*.

WARRANTY.

See *Company, Railway*, I., II.

WATER COMPANY. 1063

WATER COMPANY.

See *Nuisance*, II.

WATERCOURSE.

See *Rate, Poor*, III. *Turnpike Road*.

WEIGHTS AND MEASURES.

See *Scales*.

WIFE.

See *Baron and Feme*.

WILL.

See *Devise*.

WINDING UP.

See *Companies Act*.

WRIT.

Of *capias*. See *Bail*.

Of *summons*.

Under the Common Law Procedure Act, 1852, 15 & 16 *Vict. c.* 76. s. 17., a Judge made an order "that three days after service of a copy of this order at the defendant's residence the plaintiff shall be at liberty to proceed" as if personal service had been effected. Held, that the defendant had three clear days for entering an appearance, and that, a copy of the order having been served on *Friday*, the 20th *December*, judgment signed on *Monday*, the 23rd was too soon. *Weeks v. Wray*, 62.

THE END.

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